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Supreme Court of the United States

OCTOBER TERM, 1941

No. 256

DR. MAXIMILIAN GOLDSTEIN, DR. BENJAMIN SCHWARTZ, HERMAN RUBIN AND IRVING ELENTUCH, PETITIONERS,

vs.

THE UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR CERTIORARI FILED JULY 11, 1941.

CERTIORARI GRANTED OCTOBER 13, 1941.

SUPREME COURT OF THE UNITED STATES

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INDEX.

	Original	Print
Charge to jury	1	1
Opinion, L. Hand, J., Circuit Court of Appeals	34	19
Judgment of Circuit Court of Appeals	49	31
Order granting motion for leave to proceed in forma pauperis	50	31
Order allowing certiorari	51	32

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[fol. 1]

IN UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

Charge of the Court

The Court: Members of the jury: You have been listening to the testimony in this case now since the 3rd of June. On each of the court days you have been prompt and diligent in your attendance, and as nearly as I have been able to observe you were following the testimony carefully.

This has been an unusual tour of duty, and I want to say at the outset that I understand that under the rules of this court none of you will be called for service for a period of two years by reason of the length of the present task. If, in addition to that, any of you desire to be excused for a longer period, if you will make your request known to the clerk I shall be glad to endorse it. Please bear that in mind.

Various counsel in this case have, possibly from a desire to lighten the burden of the Court, instructed you in matters of law in making their summations. They told you what the burden of proof is; they have described reasonable doubt; they have told you the effect of rulings, and so on. It is my [fol. 2] duty to instruct you in those matters. The law provides that that is the task of the Court and that you must take your instructions as to the law from the Court. The reason is that if the Court makes a mistake in any of those matters the law provides a method of correction, so that you may freely rely upon what the Court tells you so far as the discharge of your own responsibility is concerned. If, however, you should happen to rely on what some counsel has told you, and if he were in error, there would be no way for correcting that mistake. That is the reason that I mention at the outset that it is your duty to take your instructions as to the law from the Court.

You understand full well by this time that this is a criminal cause, and in such a case each defendant is presumed to be innocent, and that presumption attaches to him from the outset of the trial until the jury shall return with its verdict. In order to overcome that presumption the burden rests upon the government of proving guilt beyond a reasonable doubt.

For the benefit of those of you who may not heretofore have sat in criminal cases, I propose to discuss that requirement for just a moment. It is your duty to weigh carefully all the evidence, in the case, apply your reasoning faculties to the evidence, and if, having done so, your reasoning faculties tell you that there is a doubt as to the guilt of any de-
[fol. 3] fendant, it is your duty to return a verdict of acquittal as to that defendant.

In so applying your reasoning faculties you must recall that it is a rational process in which you indulge. Your emotions have no part in your deliberations. The favorite type of emotion, as perhaps you know, is prejudice; another one is sympathy. Neither of those emotions, nor any others, are to be permitted to enter into your deliberations. You can conceive, if you like, that this is just as rational a concern on which you are about to embark as adding a column of figures. If you add 2 and 2 and 3 and 3 and 4 and 4, I think the result is 18. You cannot influence that result by being sorry that it is 18 or wishing that it were 17 or wishing that it were 19. So in this case you will determine what the evidence is and then you will see whether it adds up to anything or not, uninfluenced by any considerations of prejudice of any kind, or of sympathy of any kind. That is what your oath calls upon you to do.

If any witness in this case, and I think there have been about sixty who have testified, has done so falsely with respect to a material issue in the case, you have the right to disregard that witness's testimony because of the false element. You have also the right to reject from that testimony only that which you find to be false, and you may, if you choose, rely upon the balance of what he says. In that re-
[fol. 4] spect your judgment is untrammeled and it is for you to exercise, and you alone.

During the course of the trial it has been necessary for the Court to make rulings on objections and on motions. Those are called questions of law. In making those rulings the Court has intended to reveal no opinion as to the guilt or innocence of any defendant. If you think you have observed such an opinion, it is your duty to disregard it, because the question of the guilt or innocence of each defendant is exclusively for the jury to determine.

As to certain defendants, perhaps all, so-called character witnesses have been called to testify. That term in itself is misleading. They are not character witnesses; they are

reputation witnesses. You know a man's character is what he is; his reputation is what people think he is. And that necessarily is a matter of opinion. Reputation evidence is legally admissible. It is to be considered as part of the evidence in the case. If that reputation evidence is accepted and believed by the jury it may be that the task of the government of proving guilt beyond a reasonable doubt is thereby increased. It may be heavier because the jury accepts that evidence than it would be if that evidence were not in the case.

Of course you realize that much of the evidence in this [fol. 5] case is circumstantial. Circumstantial evidence is indirect evidence, and like indirect lighting it may be illuminating. A simple example of circumstantial evidence would occur if you should look out of the window and observe that — is raining, and in a moment or two a man should enter the room where you are with his hat and garments wet. That would be circumstantial evidence that he had been out in the rain, although you had not observed him out in the rain. Circumstantial evidence, as I say, is indirect. It may be extremely important. It may be relied upon by the jury in reaching a verdict; but in order that you may rely upon it to support a verdict of conviction, a verdict of guilty, circumstantial evidence must point inevitably to guilt. Circumstantial evidence which is consistent with innocence may not be relied upon to support a conviction.

Now as to this indictment. You have been told that it is a formidable and weighty document. It is. But don't be misled as to its efficacy. An indictment itself is not a self-proving document. It is a charge; and in order that it may be sustained the government is called upon to prove the allegations in the indictment by the measure of proof which I have explained to you.

It contains 30 counts, 29 of which have to do with this scheme to defraud, and the 30th is the conspiracy [fol. 6] count.

The scheme to defraud as outlined in the indictment calls attention to the presentation to insurance companies, which are called the victims, of false and fraudulent claims on behalf of the holders of insurance policies containing this disability clause whereby the companies were induced to pay money, and that that was due through the instrumentality of lawyers, doctors and chasers.

So far such a crime would not lie in this court. The reason that it is here is that the indictment alleges that in the perpetration of that scheme to defraud the United States Mails were used. Of course that is unimportant in a practical sense. The scheme might have been carried out if messengers were used to deliver communications; but the indictment alleges that the United States Mails were used, and the proof is that as to each of the first 29 counts, one or more communications were mailed; so that so far as the jurisdictional question is concerned there is no problem presented to you whatever. The mails were used and that is not contested.

The 30th count, as I say, is the conspiracy count. You are to understand the legal implications of that allegation. If two or more persons engage in the commission of a crime, the law says that before they commit the crime ordinarily they enter into a conspiracy to do it. You will see why [fol. 7] that must be so. The very fact of cooperation argues an antecedent understanding on the part of the two or more persons who so cooperated, and in the eyes of the law a separate crime is committed when the joint enterprise is agreed upon, providing that at least one thing is done to carry that joint enterprise into effect. There may be more than one step taken, but in order that criminal responsibility may attach for the entry into, and carrying out of the conspiracy, there must be this sort of action, followed by the doing of at least one thing to carry that concert into effect.

This indictment alleges 65 acts. Those are called overt acts, and it is not necessary to dwell at length upon them at this time. I am merely explaining to you now the nature of this indictment, the nature of the two crimes that are charged, in order that you may have clearly in mind how to apply the evidence to those two crimes.

The indictment is quite circumstantial in describing this crime. It says that the scheme involved these claims for total disability when, in fact, total disability did not exist, and in connection with the presentation of those claims the compilation of false medical records, including the dates of treatment; histories, diagnoses, imaginary ailments; the operation of Garrows' law office in which Weiner [fol. 8] was assistant; the activities of Jesse Isaacson and Abram Isaacson with Garrow; the payment by Joseph and

Elias Garrow of expenses, doctors' bills, hospital bills and so forth; the activities of Elentuch as a chaser, when he brought claimants to Garrow, in cooperation with Panzer and Heller; the filing of false claims, the claims being known to be false by both the claimants themselves and the Garrows; the coaching of claimants so as to prepare them to present their claims in a convincing way; hospitalization on the part of claimants when none was required, which involved the fabrication of false hospital records; the activities of Maximillian Goldstein and Benjamin Schwartz, with Dr. Messman, Dr. Rosenbaum and others, in falsely certifying to heart ailments; falsely certifying to dates of treatment; and the self-medication on the part of the claimants; the use of digitalis prior to the taking of these e k g's, and the sending of these claimants, or some of them, to eminent specialists for the purpose of securing certificates or reports from them to be used in behalf of the false claims—that is the scheme in general; and with reference to each of the 29 counts it is alleged that it was part of the scheme that the United States Mails should be used in furtherance of it.

I think it is unnecessary to recount the 65 overt acts that are said to have been *down* by some or all of the [fol. 9] defendants in behalf of the conspiracy to put that scheme into operation. If the evidence convinces you that at least one overt act was committed, provided you find the conspiracy to have been entered into, that is sufficient to sustain a conviction as to the conspiracy count, and it is not necessary that each defendant shall have been shown to have committed one or more of the overt acts, because the theory of a conspiracy is a concert of a partnership activity, in which all of the partners become responsible in the eyes of the law for the act of any one partner, with the reservation of course that the act to which I have referred is an act in furtherance of the conspiracy.

As I say, there are 29 of these mail fraud counts, and if you should find that there were such a scheme to defraud, and that each defendant, or any defendant, entered into and became a part of that scheme to defraud, you would be justified in finding that each defendant who did so participate is legally accountable for every one of the separate acts. But it seems to me that that is putting a very heavy burden before the jury, because it would require that you examine this entire testimony really six times, because

there are six defendants. And in order to save you such tedious and practically unnecessary task, I have drawn up a schedule which contains at the top the count numbers. The lefthand column is headed with the word "Defend- [fol. 10] ants" and under the word "Defendants" the name of each of the six defendants now on trial, and then I have indicated in the appropriate space that there is testimony tending to connect that defendant with that count in the indictment. I propose to deliver that to you for your use in the juryroom.

In order that the record may be complete on the subject I am charging the jury that there is evidence in the case concerning the defendant Goldstein with respect to counts 17, 18, 21, 22, 23, 24 and 25; with respect to the defendant Schwartz with reference to counts 3, 12, 13, 24 and 25; with respect to the defendant Rubin with reference to counts 24 and 25; with respect to the defendant Cooper with reference to counts 14, 15 and 16; with respect to the defendant Hessenberg with reference to counts 26, 27, 28 and 29; with respect to the defendant Elentuch with reference to counts 19 and 20.

As to the counts not referred to in the statement just made, I am granting the defendants' motions to dismiss, for, it seems to me, that there is not that character of evidence which would justify my submitting to the consideration of the jury the question of guilt on any of the counts which I have not mentioned.

I suppose it is clear to you by this time that you are dealing in this case very largely with what must have gone [fol. 11] on in the minds of several of the defendants. Human ingenuity has not thus far devised anything which would give us a chart, like these electrocardiograms which repeat pulsations of the human heart, which would depict for us the operations of the human mind; nor have we the facility for looking into the human mind. All that we can do is to examine critically the conduct of a given individual, and having done that, reach a conclusion as to what that individual intended or knew before he engaged in the conduct which is the subject of our examination. That is rather a critical and important process, and in doing it I think you will find, and I am sorry that I shall probably have occasion to repeat this expression, that we must first examine all that is known before we try to determine what was in the mind of a given man with respect to that which

is not precisely known. We move from the known to the unknown.

Counsel have paid their respects to the insurance companies and to the activities of insurance company lawyers as though there was something to be ashamed of in the fact that the United States Government has presented this case; as if insurance companies should not be protected from fraudulent enterprise. Of course the precise contrary is the fact. One or more insurance companies have the perfect right to call upon the law-enforcing branch of [fol. 12] the State or Federal Government to protect them from fraud. So you will please disabuse your minds, if you can, of any prejudice born of that aspect of the case.

I wonder if you recall a chance remark that Mr. Garrow made on the stand? I am going to refer to it, not only for its importance in this case, but by way of giving you something to think about when you serve on a civil jury some time. He said, quite by way of comment, "You know insurance companies are not treated well by juries." Do you recall his saying that? I don't know why that should be so. I am afraid it is so. I am afraid that juries are very willing to spend insurance company money so I think you ought to recall that remark made by a lawyer who was engaged for a number of years in depriving insurance companies of their money.

Now, as to Messman and Garrow, it is quite true that they revealed, as to each of them, a very low moral character. I do not wish to say very much more on that subject than has already been said repeatedly. But as a member of the legal profession, and as one who greatly admires the medical profession, I want to remind you members of the jury of this: Messman and Garrow are not crooks because one of them is a lawyer and the other is a doctor. They would have been crooks if they had been blacksmiths [fol. 13] or plumbers or carpenters or builders. They were naturally crooks. And you will have to examine their testimony in the light of that knowledge. They were co-conspirators, and unless they have been contradicted, and that contradiction has escaped me, there is one portion of their testimony that you may accept freely, and that is that they were conducting this conspiracy. They told you how it was started, and they told you how it prospered over the years, and no one has contradicted that, so that the scheme to defraud as depicted by Barrow and Messman really did

exist, and it was the source of very material revenue. So much of their testimony stands uncontradicted unless I am greatly mistaken.

Since they are co-conspirators, and since they are individuals of the character which they have clearly revealed, it is your duty to scrutinize their testimony with the utmost care, and you would be wise if you insisted on its corroboration in examining the conduct of the defendants now on trial. You may find—I say you may find; I am not trying to tell you what you must find—you may find corroboration of some of the things that they said in the documentary evidence in the case; you may find it in what was said by witnesses other than themselves, including the defendants; and you may recall the statements made by them, which are [fol. 14] undisputed, but we start on this firm ground, that the scheme to defraud was created and did exist, and the precise question which you are called upon to examine is, Was each of these defendants implicated in that scheme? That is, did he intentionally and knowingly lend himself to the scheme to defraud, and did he participate, or seek to participate, in the objects sought to be accomplished.

At the outset of discussing the testimony I wish to say, if you will permit me to do so, if I were a member of this jury I should not rely upon the statement of Messman, I think it was, that Dr. Goldstein enjoyed the reputation of a fee splitter in the Sydenham Hospital, nor should I accept the testimony of Garrow that Dr. Schwartz was a notorious fee-splitter. I should consider that that testimony was not in the case. In the first place it is not an issue before you. It may be true or it may be false, but it is not an issue in this case.

Moreover, if I am capable of observing, those two observations were volunteered by those two witnesses; nothing in the questions that were being propounded to them called upon them to make those statements, and I advise you to disregard them.

I propose to discuss the evidence in the case, members of the jury, not at great length. You have been exposed to that process for the past two days. I am going to comment [fol. 15] on part of the evidence, although "comment" is the wrong word perhaps. I am going to direct your attention to part of the evidence in the hope of clarifying your task. If in doing that I should be betrayed into stating something concerning the testimony which does not accord

with your recollection and your understanding of the testimony, of course you must disregard what I say. It is just an honest mistake. Nor in commenting on the testimony do I intend to suggest now what your conclusion should be. I may suggest to you that you may wish to ask yourselves certain questions. In doing that I do not insist, I have no right to insist, that you ask yourselves those questions. You have a right to disregard them.

Moreover I do not intend to suggest what the answer to those questions may be. So that with that understanding, and I guess it is clear between us, let us view some of the aspects of this long and huge volume of testimony. And I ought to say one further thing, that by calling your attention to certain incidents I do not mean to insinuate that they are the only important elements in the case. I simply mention that those particular matters occur to me as being important for me to discuss with you. I do not mean to suggest that all other evidence in the case is unimportant, because the contrary is the fact. It is all important.

[fol. 16] You will see, I suppose, without thinking about it very much, that these defendants resolve themselves into three groups. First, there is Elentuch, said to have been a chaser; second, there are the holders of the policies, the claimants—Cooper, Rubin, Hessenberg. They are in a group; and then there are the two doctors, Goldstein and Schwartz, said to have been used by Garrow, and by Garrow and Messman in cooperation with the claimants, for the purposes that have been described.

It is always helpful if you take up a complex situation at the easiest end and see what you know is clearly established. And according to that theory I should examine the Elentuch case. That is quite simple.

Elentuch admits that he took Ellenbogen to Garrow and that he received $300 of Garrow's fee. If I am not mistaken Garrow's checks were produced. I think there was a $300-check and two $25-checks. Moreover, Elentuch has made three statements, two of them signed and one unsigned. It is conceded that he was caused to take Ellenbogen to Garrow's office because of what Panzer told him, Elentuch, about Garrow. He has not told us whether Panzer told him, Elentuch, all that Garrow had done to promote Panzer's own claim. We have heard some testimony on that subject, and of course it is left rather for you to consider whether it would have been likely that Elentuch

[fol. 17] would have taken Ellenbogen to Garrow and share his commission from Garrow with Panzer unless he had had from Panzer a pretty clear explanation of the Garrow technique. Be that as it may, Garrow did say on the witness stand, and it is for you to say whether it is worth anything or not, that in the presence of Elentuch he told Ellenbogen that they would have to build up a heart case. Elentuch denies that that statement was made.

All questions of the credibility of witnesses are for the jury to pass on, and perhaps I ought to observe as to all defendants they are not required to take the witness stand. They have the right not to do it. Having taken the witness stand they offer themselves to the scrutiny of the jury. Their testimony in its persuasive qualities is neither better nor worse because it proceeds from the lips of the defendants. It is to be measured exactly as the testimony of any other witness. However, with respect to all interested witnesses, the law says that the jury must be admonished that in weighing the testimony of an interested witness there must be present in your minds at all times a realization that that particular testimony proceeds from the lips of one who has something at stake in the outcome of the case.

It may be that you will wish to ask yourselves, in passing upon the guilt or innocence of Elentuch, is it likely that he [fol. 18] would have steered Ellenbogen to Garrow unless he had first acquired from Panzer an understanding and knowledge of the Garrow methods. That question is fairly posed by the evidence.

Taking up the second of these groups we find that the claimants were Schoenberg, Rubin, Cooper and Hessenberg. Of course, you are relieved of any consideration with respect to Schoenberg. Schoenberg, in your presence, pleaded guilty. Now that means that Schoenberg admitted that he became a part of this scheme to defraud the insurance companies knowingly and intentionally; that he misrepresented his physical condition in order to get money out of the companies; so that you are relieved of any consideration of that particular claimant. You will not report a verdict on him. He has relieved you of that necessity.

Rubin is a defendant as to whom it is alleged that there was medication. The proof on that subject presents one of the important issues upon which you will have to pass. Rubin denies that he took any medication. But in dis-

cussing Rubin, Cooper and Hessenberg it might be wise to reflect that, of course, a man in perfectly good health would not be expected to have the opportunity to prove disability, even with the help of medication, that a man would have whose health was in some respects impaired. So that you [fol. 19] may start in your inquiry with the assumption that to some degree each of these three claimants suffered some physical impairment. Don't waste your time on that. The question is if there was a physical impairment was there permanent, total disability. Or could the appearance of permanent and total disability be established only through the employment of fraudulent methods and means? That is the question that confronts you, and if you say, Yes, that is true, the appearance of permanent and total disability did require the use of fraudulent methods, then were those methods employed by these defendants? That is your question. So I say, and really the situation is common as to these three defendants, Rubin, Cooper and Hessenberg, did they misrepresent their actual conditions in order to induce the companies to believe that they were permanently and totally disabled?

Of course it is a striking thing that each one of them asserted a heart condition. You have probably observed that. I don't suppose there is any way to establish with mathematical certainty whether Rubin was medicated or not. But it may be possible for you to reach a conclusion on the subject, according to the required burden of proof, by considering the testimony of the various physicians, the sundry electrocardiograms, and what the defendant Rubin has revealed of himself and his mental and moral [fol. 20] processes while he was a witness on this stand. I think that those are the elements which you will have to take into consideration in reaching a conclusion as to whether he did misrepresent the nature and extent of such disability as he asserts he suffered from, in order to make the companies believe that he was permanently and totally disabled.

That evidence has been discussed for the government by Mr. Dailey, and for Mr. Rubin by his attorney, Mr. Loeb. It would not serve any useful purpose for me to go over it. I suggest to you that you give it your very careful attention, because you will have to answer that question.

The same applies to Cooper, having in mind the representation necessarily made in connection with the reinstate-

ment of a policy. You heard what he said concerning that. You must weigh it carefully, because,—and this remark applies to all witnesses, not to any one,—you do not have to believe everything that every witness tells you unless you are prepared to leave your common sense outside of the juryroom, and I know of no such requirement.

Reference was made in connection with this case to Dr. Crawford's testimony. He made a physical examination on June 18, 1938. The patient was nervous; no blue lips; no distention of the neck veins; some sclerotic changes in the arteries of the eye; pulse was weak; some thickening [fol. 21] of the radial arteries; no murmurs; the first aortic beat was faint; the second accentuated; there was a slight enlargement; during the hospital stay he was uncommunicative; spells of excitement, shouting and so forth. "I witnessed one bad attack of pain. It did not seem to be an attack of angina pectoris. No man really so suffering would have so behaved."

Dr. Rosenbaum: "Cooper gave me a history of illness on his first visit, December 7, 1932. He had a sheet of paper with history and symptoms; also a story of treatment by Dr. Straus previously."

I refer to that because of the frequent statement that has been made that histories were fabricated. There is Rosenbaum who says that such a history was given him. He is not a claimant. He is a doctor. He says that a sheet of paper was given him with a history on it. Again, of course, you do not have to believe it, but I am merely calling your attention to the fact that that testimony is present in the case.

Now Hessenberg: Also a heart condition. Moving from the known to the unknown in that case, there are false statements admitted by this defendant. You probably have not overlooked those, and it is quite important that you should ask yourselves whether there was a second, a new history presented by Hessenberg of an onset in October of 1934, [fol. 22] instead of October of 1935. The testimony of his uncle was quite clear that the seizure in the store occurred during the month of October, 1935. The statement was made for the government that Hessenberg asserted a history of an onset in October of 1934. If that is contained in one of the documents in the case I would like to see it.

Mr. Nathan: The claim was made that the attack came on in October, 1935.

The Court: I know the first claim was.

Mr. Nathan: The only claim to the insurance company was for total disability from October, 1935.

The Court: I am speaking of that new history which was said to have related to October, 1934. I mention it in my notes.

Mr. Dailey: The second paragraph there, your Honor (handing paper to Court.)

The Court: Is this Government's Exhibit 64?

Mr. Dailey: Yes, sir; and the answer, your Honor to question 9(a) in Government's Exhibit 144, the last page (handing paper to Court).

The Court: Exhibit 144 is a photostat of the insurance statement. It is dated November 28, 1936. I think the signature by Hessenberg is not contested. I think it is his testimony that he wrote out the answers himself. In answer to question 9(a), which is, "On what date did the [fol. 23] illness begin that led up to the present disability, and what was the nature of the illness?" The answer is: "Since early part of 1932 I began to suffer from diabetes and since 1934 have been suffering from heart disease."

That is an interesting statement. You will recall the testimony which is that the diabetic condition dated back to perhaps November of 1926, not 1932, and that the testimony as to the occurrence in the store fixes the month as October, 1935.

The report of Dr. Wyckoff, which is Government's Exhibit 64, has a paragraph headed "Previous history: The patient states that he has been in perfectly good health until 1932. In 1932 he began to notice that he was passing large amounts of urine and he had considerable thirst. He went to a physician who told him that he had diabetes. He did not take very good care of himself and in 1934 went to see Dr. Messman complaining of shortness of breath and palpitation, polyuria and polydypsia. He was put on a diet of carbohydrate 60, protein 150, and 40 units of insulin a day. In 1934 he began to have pain on effort and this gradually grew worse."

[fol. 24] It is fair I think to state that, if I recall the testimony of Mr. Hessenberg, he said that part of the history given to Dr. Wyckoff was stated by Dr. Messman, and that on leaving the office with Dr. Messman, he protested against the exaggerations. We have only his testimony on that subject. You may wish to ask yourselves whether he did

anything more than protest to Dr. Messman on the subject.

Not to unnecessarily repeat, your problem in dealing with these three claimants, Rubin, Cooper and Hessenberg is to answer the simple question: Did they misrepresent to the insurance companies the true nature of their physical impairments, seeking to establish permanent and total disability by reason of a heart condition, knowing that the representation was false?

In the third category of defendants are the defendants Schwartz and Goldstein. I do not purpose to discuss all the evidence which touches them any more than I have the evidence as to the other defendants. But there are certain considerations which, in fairness to you I think I should call to your attention. Each of these defendants admitted having had between fifteen and twenty cases with Garrow alone or with Garrow and Messman. Each of these defendants says that he was a consultant, that is to say, a physician who, because of his special attainments, is con- [fol. 25] sulted by other physicians with respect to the conditions of their own patients. That, I think, would be fairly accepted as a definition of a consultant—when he is consulted by other physicians, and necessarily men in that professional status hold themselves out as having special capacity in the field in which they function. They dealt with Messman and Garrow over a period of years, 1934, 1935, and 1936.

I suggest that you turn your minds back to Messman and Garrow as you observed them. I think that together they were on the witness stand a matter of about three weeks. I think you had an ample opportunity for appraising them. What do you say as to the impression that they would be likely to create on consultants? Would consultants be able to observe, during a period of dealing with those men, what their essential qualities were? Is it likely that the defendants Goldstein and Schwartz were sufficiently equipped with the powers of perception to fairly well appraise Garrow and Messman? Now bear in mind, and this is the testimony of both of those defendants, that in many cases Garrow paid their fees. You may wish to ask yourself the question as to whether that fact, in itself, would suggest anything to the mind of a consultant. Why should a lawyer be paying the fee of a patient? Again I remind you I am not suggesting the answer to these questions, but I am [fol. 26] merely pointing out to you that you may wish to ask

these questions of yourself in order to reach a conclusion as to what was present in the minds of Goldstein and Schwartz by way of understanding what they were doing in dealing with these various cases that were brought to them by Garrow or Garrow and Messman.

With reference to the defendant Schwartz there are one or two important aspects of his testimony that I think should be called to your attention, and, again reasoning from the known to the unknown, there is this incident of the substituted sputum. Schwartz says that he learned of that from Messman; Messman told him about it. Schwartz says that Messman was complaining of the service in the pathological laboratory of the hospital, and as an example of the cause for his dissatisfaction he said, "Why, I substituted sputum for this patient Kaplan, and I got a negative report." Does that reveal anything to you? Just reflect for a moment. If the prior dealings between Schwartz and Messman had been only the conventional dealings between a physician and a consultant, would the physician, Messman, out of a clear sky, and in apparent departure from the conventional relations, have blurted out, "Why here, look at this sputum I substituted with reference to Kaplan"? I wonder if I make that clear to you. Is it likely that if their prior relations had been the conventional [fol. 27] relations of a physician and a consultant, that the physician would have blurted out so damaging an observation as that, an observation which would at once brand him as entirely and completely unworthy to practice his profession? Would he blurt that out, or can you reason fairly that the statement having been made, according to Schwartz's own testimony, it is fair to conclude that it was merely one of a number of indications, perhaps the culminating one of a number of indications, of the same general character and tenor? I suggest that question to you because I think it is most important. And in connection with that you will wish to ask yourselves why it was important, or deemed to be important by the defendant Schwartz to conceal from the grand jury his knowledge of Messman and his methods? Why was it important to conceal that? If there was nothing in the antecedent relations of Messman with Schwartz, is it reasonable to assume that Schwartz would have said, "I discovered that Messman was a disgrace to his profession in the month of November or October when this Kaplan incident took place.

Up to that time I relied on him implicitly. From that day forward I had nothing to do with him." Would he have been likely to do that if that had been the fact? I think you are bound to consider that because you are continually confronted with the necessity for probing into the mental operations of these defendants as they have been dis- [fol. 28] closed to you in the testimony in this case.

In regard to Klaristenfeld's notation on that e k g,—was that a Nelson e k g or was that a Rubin e k g?

Mr. Dailey: Kaplan, your Honor.

The Court: That is an incident that you will probably wish to reflect on rather seriously for more than one reason. If I am not mistaken it took place in the month of October or November of 1935. Klaristenfeld was on the witness stand. He was a technician; he was a consultant. He was not a cardiographist, or whatever they call it. He was just a technician, and yet he wrote on this e k g, "This suggests digitalis." Now does that tell you anything about what men who held themselves out as consultants probably knew at that time with respect to the effect of digitalis upon the e k g? Were they charged with some information on the subject?

Now what happened? Klaristenfeld's notation was the subject of a dispute at once between Garrow and Klaristenfeld, and then Schwartz was called in. And what did Schwartz do? According to his own testimony—now I am not speaking about what Garrow or Messman or somebody else said—he said, "Why, take another e k g." Was there information conveyed to him at that time? Was it a shock to him to find that someone suggested the use of digitalis? Or did he react to that incident as though it were a trifling [fol. 29] thing? Those are questions I say the answers to which may help you to reach a conclusion as to the guilt or innocence of the defendant Schwartz.

Now coming to Goldstein: He again was a consultant; he again handled from 15 to 20 cases for Garrow. And he said quite frankly that he knew they were insurance cases, and he knew that Garrow preferred to have him make affirmative, positive reports to the insurance companies, but he said he did not do so in all cases, but he said that he knew that that was Garrow's preference. He was paid by Garrow. What do you say as to his conduct with Garrow over these years? Was it such as was calculated to apprise him of Garrow's activities or not? If it was not, do not hesitate

to reach that conclusion, and of course the same applies to Dr. Schwartz.

Is there anything particular in the testimony respecting Goldstein that tends to throw a little light on what he must have known and understood about this whole situation? I am going to refer to the Fradkin case, because Fradkin's testimony is worthy of your attention. The point that is involved in that is the predating of consultation with Goldstein. Now please don't think that the predating of these certificates, or the predating of treatments recited in the certificates rather, is a trifling and inconsequential thing. [fol. 30] It is not a thing that was incidentally overlooked and it might just as well be one date as another. It was of the utmost importance that the dates should be accurately and precisely stated. That is the purpose of the questions, because the answers are the things that the insurance companies have to rely upon as to the onset and the probable date of the start of disability. Now it is a serious thing, if it be the fact, that Goldstein never saw Fradkin until September of 1936, whereas he certified that he had consulted with him in the previous February. There must have been a reason for that, if that is what was done. That it was done, that is to say that there was a medical certificate which contained the statement that the first treatment was in February of 1936, I think admits of no question. I think it is not the subject of contest in this case.

Now is it the fact that Fradkin consulted Goldstein in February of 1936? Fradkin was on the witness stand before you. He is the violinist. He performs on radio programs. His compensation by one of the exhibitors over the radio was established by the payroll books and it was a continuous record. He says that he felt pain across the chest and in the arms at the least effort, and he went to Dr. Shapiro to get an e k g, and Dr. Shapiro sent him to Dr. Chandlee. He was playing over the radio with orchestras at the time. He went to Dr. Chandlee in September. She is a family doctor [fol. 31] and she took the e k g and I think Exhibit 18 is that e k g. She had never heard of either of the Garrows or Dr. Goldstein. His cousin, a Mrs. Rosen, who is an insurance broker, told him to go to the Garrows. That was after he had seen Dr. Chandlee. He saw Garrow, told his story, and he saw Dr. Messman within a month after September 1, 1936, who examined him and took an e k g. He said Fradkin was in bad shape and that he was to do nothing. (The Court

reading from notes.) "He took me to Dr. Benjamin Schwartz. Garrow accompanied me to Schwartz and he asked me symptoms. Dr. Schwartz took an e k g. Garrow was with Fradkin, but he is not sure if he was present at the examination; that is, in the room." He told Schwartz of his conversation and said that there was a three-way conversation. He reported to Garrow after the e k g was developed, and he was then sent to Dr. Goldstein. His first visit was with Garrow, and he told Dr. Goldstein the same story as he told to the other two. He had not known Goldstein until that time.

Now you will recall that it is in the Fradkin case that Goldstein's office records are missing. Does that tell you anything about knowledge on the part of the defendant Goldstein of a scheme in which Garrow and Messman concededly were engaged?

I will not discuss the Nelson e k g's any further. You understand the fact that it is asserted by the government [fol. 32] that one that was actually taken on the 15th of July is predated to the 17th of June. If you find that there was such predating, no matter how it was brought about, that may throw some light upon this fairly obscure question as to what the defendant Goldstein really did know about Garrow's enterprise.

Hochberg says that he was medicated by Goldstein. You don't have to believe Hochberg, but his testimony is before you and I think you would do well if you would consider what Hochberg had to gain by testifying falsely, if he has testified falsely, on the subject of having been medicated.

Now that Rubin letter, the letter to Rubin written on the 2nd of September, 1936, is another subject concerning which you might well spend a little time. You will recall that that letter is explained by Goldstein as having been the medium of an appointment with Rubin in which he sought to ascertain whether Rubin had money enough to consult with Dr. Wyckoff. You might look at that letter for what it may or may not teach you. Do you see anything in that letter on the subject of a consultation with Dr. Wyckoff? You may ask yourselves whether had that been the object of the letter, wouldn't it have been perfectly simple to notify Rubin that an appointment with Dr. Wyckoff had been made at a certain date, and to say: if this is not agreeable, let me [fol. 33] know? You may wish to ask yourselves whether it was necessary to have Rubin come to Goldstein's office in

order to confer with him on his ability to raise money to pay Wyckoff, in view of Goldstein's testimony that in a great many, if not all, the cases Garrow paid the fees.

There is just one more subject to which I think your attention should be directed. It was the testimony of the defendant, Goldstein, that in 1935 he was not aware of the effect of digitalis upon the e k g. I think if you will look at the e k g's, or some of them, which were used in the Sydenham Hospital, you will find that there is on the back a question as to whether the patient has received digitalis. Now why do you suppose that was there if it was an unknown thing among cardiologists that digitalis had an effect on the e k g? These are matters concerning which you ought to inquire very fully and you ought not to seek to reach an answer until you can do so to your satisfaction, and in the discharge of what you understand to be the duties which you have solemnly undertaken when you took the oath as jurors in this case.

That concludes the main charge. Are there exceptions to the charge? I am not passing on the requests.

[fol. 34] IN UNITED STATES CIRCUIT COURT OF APPEALS, FOR THE SECOND CIRCUIT, OCTOBER TERM, 1940

No. 263

(Argued March 31, 1941. Decided June 2, 1941)

UNITED STATES, Appellee,

v.

MAXIMILIAN GOLDSTEIN, BENJAMIN SCHWARTZ, HERMAN RUBIN and IRVING ELENTUCH, Appellants

Appeals from judgments of conviction of the District Court for the Southern District of New York, under an indictment for using the mails to defraud and for a conspiracy to do so.

Before L. Hand, Swan and Augustus N. Hand, Circuit Judges

Theodore Kiendl for Goldstein; Lester R. Bachner for Schwartz; Benjamin Kronenberg for Elentuch; Sidney J. Loeb for Rubin.

Maxwell S. McKnight for the appellee.

OPINION

[fol. 35] L. HAND, *C. J.*:

These are appeals from convictions for a scheme to defraud—together with a conspiracy to commit the same crime. The scheme was the same as that which was before us in *United States* v. *Weiss*, 103 Fed. (2) 348; but the convictions which we then affirmed were under another indictment and all of the accused except Goldstein were different from those now at bar. The Supreme Court reversed these convictions (*Weiss* v. *United States*, 308 U. S. 321) because of the admission of certain "wire taps," and when the case went back for a new trial, a preliminary hearing was had, following the practice prescribed in *Nardone* v. *United States*, 308 U. S. 338. Before any decision had been made upon the evidence taken at this hearing, J. J. Weiss, one of the accused, pleaded guilty; thereupon the prosecution proceeded under the present indictment, which was then pending, and abandoned the "Weiss" indictment. The evidence already taken was by agreement admitted in a similar preliminary hearing begun under this indictment, at the end of which the judge decided that the prosecution should be allowed to call as witnesses two of the prime movers in the scheme, Messman and Garrow, overruling the objection that they had been induced to turn state's evidence by means of records obtained by "tapping" their wires. One of the seven accused pleaded guilty during the trial, but the other six went through to verdict, and the appellants are four of these. The important points raised are (1) that the testimony of Messman and Garrow was procured by "taps," (2) that it did not also appear that the "taps" had not served as clues leading to other evidence which had been introduced, (3) that the judge's charge was not impartial, and (4) that the evidence did not support the verdict.

In order to decide how far the use of the "taps" should have prevented the calling of Messman and Garrow, we [fol. 36] must go back to the original discovery of the frauds. Sometime before August, 1936, a number of large insurance companies, suspecting that they were being victimized, retained two firms of lawyers to run down the culprits. One Bernstein was a member of one of these firms, and in that month a man named Kipnis came to him and made an oral confession which laid bare the outlines of the

whole scheme. Kipnis had been one of the insured who had fraudulently collected upon a disability policy, and he had helped a number of others to commit similar frauds. The plan involved the insured's taking digitalis or some similar drug which would make his heart's action simulate disease, and this, together with a proper paraphernalia of cardiograms, hospital records and declarations of symptoms, was enough to evade detection by the insurers. To the success of such a scheme a confederation of lawyers, doctors—including heart specialists—and of course the insured themselves, was necessary. Kipnis inculpated Weiss and Garrow, lawyers, Messman and Goldstein, doctors, and a great many others. His story to Bernstein, as Bernstein gave it, if believed, made a complete case, but obviously he would not be believed unless thoroughly corroborated; and Bernstein set out to procure the necessary corroboration. He instructed Kipnis to keep up a front of continued participation in the scheme and he installed in Kipnis's offices a dictaphone which would record talks with visitors. Besides this, he got records of telephone talks between Kipnis and his confederates, by means of an extension receiver at which a stenographer was placed; no machine was interposed in the circuit during this period. Matters went along in this way through August and September, Kipnis meanwhile disclosing to Bernstein numerous fabricated "case histories" of fraudulent claimants. On October 8, 1936, Kipnis made a detailed and lengthy written confession which implicated Weiss, Garrow, Messman, Goldstein and [fol. 37] a great many others, and which, along with his other material, Bernstein shortly thereafter presented to Hardy, the district attorney, who on November 27th, called in a post-office inspector, Shea, to work up the case. On December 6, Shea, without any independent investigation of his own, turned in a report to Hardy in which he declared that there was ground for the indictment of 75 or more persons. Towards the end of January, 1937, Hardy had a conference with Bernstein and the other insurance lawyers at which they decided to begin the regular "tapping" of the wires of the principals in the scheme by introducing recording machines into the circuits; and this went on with some interruptions from that time until the arrest of Messman and Garrow on May 18, 1937, and even later. By these means nearly a thousand records were procured of talks between the confederates, in none of which, how-

ever, did any of the appellants at bar take part. The prosecution introduced none of these records in evidence, and they could therefore have contributed to the convictions only in two ways: they might have contained clues leading to the discovery of some of the evidence actually introduced; and they might have served in whole or in part to induce Messman and Garrow to turn state's evidence and become the chief witnesses at the trial. The prosecution denied that they were useful as clues, or that they had helped in any way except as confirmation of information which it already had. The record contains nothing to contradict the testimony of those gentlemen who had prepared the case and who swore that Kipnis's confession, the cardiograms, the insurance files and the hospital records were the sources of all their information. We should not therefore have been justified in sustaining a finding that the "taps" had served as clues, even if one had been made and if the prosecution had the burden of proof upon the issue.

There remains the question whether the "taps" served to break down either Messman or Garrow and turn them into [fol. 38] informers. The testimony of each was so vital to the case that the convictions cannot survive if the prosecution should not have been permitted to call either. Both these men were arrested on May 18, 1937, and Messman was taken at once to the district attorney's office where an assistant examined him. The assistant told him that his telephone and "all these lawyers' telephones" had been "watched"; that he might hear his own voice if he chose; that the prosecution would like to know whether he would tell everything or "play ball" with the accused; and that it knew what was going on and was not "stabbing in the dark." As he did not then break down he was put into the same cell with one, Nelson, another of the confederates, who told him and still another, Gross, that the prosecution had gathered together "an awful lot of evidence" including telephone records in which he, Nelson, had heard a talk of his own with Weiss. There was "too much dirt against us. The government has got everything." After hearing this from Nelson, Messman was on the same day taken back to the assistant's room where he confessed. On the preliminary hearing he denied that the telephone record had had anything to do with his breakdown; he said that he had seen the net gathering about him for some months before his arrest, had decided that his only chance was to plead

guilty, turn informer, make what terms he could with the prosecution, and, as to his sentence, to rely upon the help he could give to convict the others. He confessed that he was abandoned in morals, ready to do anything that would serve his turn, and showed himself utterly untrustworthy. It is indeed curious, if he had made up his mind to change front before he was arrested, that he failed to confess when he was first before the district attorney and waited until after Nelson had dilated upon the amount of evidence which had been accumulated against him. One would have expected that on his own story his arrest would have been enough to [fol. 39] touch off his confession. However, if the judge had affirmatively found that the "taps" contributed nothing to this result we should not have disturbed the finding; it is not impossible that although from the start he meant to confess, he might not have seized the first moment to do so. The difficulty is that it does not appear that the judge meant to find more than that the accused failed to prove that the "taps" had contributed to the breakdown. For this reason the issue depends upon which side had the burden of proof at the hearing.

The case for the accused is considerably weaker as to Garrow. He too was arrested on May 18, 1937, but he did not confess until nearly two years later. It is true that he did so only a few days after we had held in *United States* v. *Weiss*, 103 Fed. (2) 348, that it was proper to allow the introduction of the "taps," and the argument is not without plausibility that this sequence was causal: Still, he was not subjected to the same pressure as Messman, and like Messman he declared that the "taps" had not influenced him at all, though his word was, if possible, even less reliable. Again, we should not have disturbed an express finding, had there been one, and the issue, like that as to Messman, depends upon the burden of proof. Upon that question we have nothing to guide us but *Nardone* v. *United States*, *supra* (308 U. S. 338) and that did not actually decide the question. It is true that Mr. Justice Frankfurter did say (p. 341) that the accused had the burden of proving that the prosecution "tapped" the wires, and that if he did, the judge must give him a fair opportunity to show how far the "taps" had infiltrated into the case. He added, however, that after this had been done it would leave "ample opportunity to the Government to convince the trial court that its proof had an independent origin." That language can-

not indeed serve as a ruling that the prosecution has the burden to show how far its proof has "an independent [fol. 40] origin," but it is consonant with that position, and to some extent suggests it. In any event it appears to us that this should be the rule in analogy to the well settled doctrine in civil cases that a wrongdoer who has mingled the consequences of lawful and unlawful conduct, has the burden of disentangling them and must bear the prejudice of his failure to do so; that is, that it is unfair to throw upon the innocent party the duty of unraveling the skein which the guilty party has snarled. To impose the duty upon the prosecution is particularly appropriate here, for it necessarily has full knowledge of just how its case has been prepared; given a *prima facie* case against it, i. e., "taps" and some use of them, it should do the rest. It is true that the tendency has of late been to mollify the extreme of this requirement, substituting the best honest guess for a quantitative allocation when that is obviously impossible, so that the victim shall not get what cannot possibly be his. *Sheldon* v. *Metro-Goldwyn Pictures Corp.*, 309 U. S. 390. But there has been no disposition to relax that feature of the doctrine which resolves all possible doubts against the wrongdoer. We content ourselves with citing some of those decisions which expressly state the reasoning. *The Idaho*, 93 U. S. 575, 585, 586; *Schnell* v. *The Vallescura*, 293 U. S. 296, 306, 307; *Brainard* v. *Cohn*, 8 Fed. (2) 13, 15 (C. C. A. 9); *United States* v. *Federal Mail Order Corp.*, 47 Fed. (2) 164, 165 (C. C. A. 2); *Samson* v. *Rose*, 65 N. Y. 411, 421; *Wellock* v. *Cowan*, 246 Mich. 45. We hold therefore that, after the accused had proved that the "taps" had been made and had to some extent been used to break down Messman and to a less degree Garrow, the burden fell upon the prosecution to satisfy the district judge that they had no part, or no substantial part, in that result. This being true, and the condition of the findings and the evidence being what we have described above, we hold that, as the record stands, the judge should have forbidden the [fol. 41] prosecution to call Messman, and probably Garrow as well, though as to him we need make no finding. In so deciding we assume that the accused were entitled to invoke the protection of §605, and that assumption we shall now consider.

The authorities on that question are very few. In *United States* v. *Seeman*, 115 Fed. (2) 371, 374, we expressly held that §605 merely conferred a privilege personal to the

"sender," though we had without discussion decided the opposite once before. *United States* v. *Bernava*, 95 Fed. (2) 310. Our own decisions are not however important if the Supreme Court has ruled otherwise; and the question is, how far the reversal, even as to Goldstein, in *Weiss* v. *United States*, *supra* (308 U. S. 321) must be taken as a holding the opposite of our ruling in *United States* v. *Seeman*, *supra*. Although, as we have said, Goldstein's wires had never been "tapped," Weiss's had been repeatedly; and there were three records of talks in which Gross had had a part and three in which Krupp had. As to Weiss it therefore was clearly necessary to decide the chief point which the court discussed; i. e. whether the statute applied to intrastate messages. As to him it was necessary to discuss the second point also—the validity of Messman's consent. All this was likewise true of the records of the talks with Gross and Krupp. As to Goldstein alone did the decisions of these questions therefore become immaterial, assuming that § 605 is limited to a personal privilege of the "sender." This made it very natural for a court to disregard that point even though, as was the case, the prosecution raised it in its brief. Strictly it would indeed have been still possible to affirm Goldstein's conviction and reverse the others', but the result would have been extremely harsh. It would have presupposed that a fair trial of the others could have been had, though the forbidden records were actually introduced in evidence provided that the jury had been admonished to use them only against Goldstein. [fol. 42] Such an admonition would have been practically valueless in a case like this, and the court might well have refused to affirm Goldstein's conviction when, if the trial had been fairly conducted throughout, the records would not have gone into evidence at all. It is indeed always a matter of the greatest delicacy to say that the decision of a superior court is not to be taken as authoritative upon a point not discussed; yet there are occasions when unless we do so, we shut our eyes to the fact that in every probability it was not decided at all. It seems to us that this is such an occasion, and that the matter is open.

Our reasons for thinking that if it is open, the convictions may stand are as follows. It is well settled that, although the victim of a search, unlawful under the Fourth Amendment, has a privilege to exclude any evidence against him procured in its course, the privilege is personal to him, and

that no one else can avail himself of the violation, however scandalous that may have been. In *Connolly* v. *Medalie*, 58 Fed. (2) 629, we so decided and collected the cases up to that time which were very numerous and unanimous; and there has been no divergence since that time. Although the Supreme Court has never expressly passed upon that question, it has dealt with the privilege against self crimination under the Fifth Amendment in the same way. *Hale* v. *Henkel*, 201 U. S. 43, 69, 70. It is true that these privileges are considered as in part sanctions against the violation of the Constitution—being, in the case of searches, additional to the criminal sanctions imposed by statute (§§ 53a, 630 and 631, Title 18) and it is also true that they could have been made still stronger by forbidding the use of the evidence against everyone. Immunity was not carried so far; it was thought enough if only the injured person is protected. This was in accord with the law of privileged communications generally, for the communication is not itself privileged, only its disclosure. An eavesdropper, or a se-
[fol. 43] creted dictaphone, may record and repeat whatever is said, whether the communication be between attorney and client (*Rex* v. *Simons*, 6 C. & P. 540; *State* v. *Center*, 35 Vt. 378, 382, 386; *Hoy* v. *Morris*, 13 Gray 519), between spouses (*Commonwealth* v. *Wakelin*, 230 Mass. 567, 574; *Knight* v. *State*, 114 Ga. 48; *Commonwealth* v. *Eversen*, 123 Ky. 330) or between physician and patient (*Springer* v. *Byram*, 137 Ind. 15). Furthermore, if a witness who should claim the privilege fails to do so, his testimony is competent and its admission is not an error of which a third party may complain. Wigmore § 2196. True, when the witness does claim the privilege and it is erroneously overruled, apparently a majority of courts make the error available to third parties, but there can be no doubt that Professor Wigmore is right in holding with the minority, unless the third party shares that interest which alone justifies suppression of the truth.

So far therefore as § 605 conferred a personal privilege on the "sender," there can be no doubt, it seems to us, that he alone can invoke it. It plainly does confer such a privilege, for the "sender" may consent to the divulgence of the message after it has been unlawfully intercepted. (The discussion of the second point in *Weiss* v. *United States*, *supra* (308 U. S. 321) presupposed exactly that; and it necessarily follows from the "sender's" privilege to divulge messages which have not been intercepted at all.

The question thus comes down to whether, when the "sender" has not consented, a third party may vicariously invoke the prohibition for his own protection. In form the language is indeed imperative: "no person not being authorized by the sender shall intercept * * * and divulge or publish" the message; moreover § 501 makes divulgence a crime. In this respect § 605 is therefore unlike those statutes which punish an unlawful search, but which do not punish the use of the evidence procured. Yet, although there cannot for this reason be any question that only the [fol. 44] consent of the "sender" will condone the divulgence of an intercepted message, it does not follow that anyone else can complain of the wrong. Certainly "senders" alone are within the protected class (if it were not so, their consent would not excuse divulgence) and the purpose could not have been more than to protect the secrecy of their talks. For example, nobody but a "sender" could sue civilly for a violation of the section. *St. Louis & San Francisco R. R. Co.* v. *Conarty*, 238 U. S. 243; *Lang* v. *New York Central R. R. Co.*, 255 U. S. 455; *Gorris* v. *Scott*, L. R. 9 Ex. 125; *Boronkay* v. *Robinson & Carpenter*, 247 N. Y. 365; Restatement of Torts § 286. Nor can it be urged as a distinction that that doctrine is limited to cases where a party seeks affirmative relief for a violation of the statute; for that is what the accused at bar are seeking. The proscribed evidence, taken by itself, is entirely competent, and could be produced but for its wrongful acquisition; the accused must persuade the court to forbid its use; they ask a remedy for a wrong done to them and they must have some standing to complain. They have no standing unless they can show an interest which will be invaded by the divulgence and which the law will recognize. They do indeed have an interest which is invaded, but it is not one that the law will recognize. It is nothing better than that evidence, which shows them to have committed a crime, shall be suppressed because they are deeply interested in not being punished for that crime. If they were defendants in an equity suit, they might succeed, for a defendant in equity need not be the victim of the wrong which disqualifies the plaintiff to seek an equitable remedy, provided it is closely enough interwoven with the legal transaction involved in the suit. But, so far as we know, there is no doctrine that a criminal prosecution can be defeated by showing that the prosecutors must commit a wrong—civil or criminal—to

prove their case. Such considerations are relevant indeed [fol. 45] between them and their superiors, but these the accused does not vicariously represent. Indeed, in this particular application of such a doctrine if it existed, the curious result would be that the event would turn upon which side succeeded in securing the favor of the "sender"—a person who might very well have no interest of his own in the divulgence of the message.

Finally, whatever may be thought of the foregoing, it so chances that in the case at bar the convictions can stand even if the section does so peremptorily forbid divulgence of a message that anyone can take advantage of its violation. This is so because the section prohibits only the divulging of the message, not its use after it has been divulged, and in the case at bar no message was divulged upon the trial. The prosecution had indeed committed a crime earlier, and by hypothesis the evidence it introduced was the fruit of that crime; but that was all in the past and before the trial came on; no further violation of the section were then necessary. We of course do not forget that it is precisely the use of evidence obtained by such divulgence that *Nardone* v. *United States, supra* (308 U. S. 338) condemned, but the distinction between divulgence of the message by the very act of introducing it, and introducing evidence acquired by past divulgence, is nevertheless critical. For the only possible escape from those authorities which limit to the victim of an unlawful search the objection to evidence procured by the search, lies in the fact that § 605 expressly forbids divulgence as well as acquisition—"interception"—while the Fourth Amendment and its implementing statutes forbid only acquisition. When therefore as here the question arises of evidence procured by an earlier unlawful divulgence the parallel between the situation and that of an unlawful search becomes perfect; and it would be a curious result, if a violation of the section were more sweepingly condemned than a violation of the Constitution. Aside from the difference in authority be- [fol. 46] tween the two, the wrongs involved are so different in their heinousness: an unlawful search may be the invasion of the home itself, an outrage which no people will endure which still dares call itself free; the interception of a telephone message, enraging as it is, is not worse than other violations of secrecy which the law countenances.

The only other point which needs extended discussion is the judge's charge. This was long and detailed; he repeatedly advised the jury that they were not to take as authoritative any opinions he might venture as to the facts. He then put before them a number of questions whose answers they might, he thought, find important or even critical in deciding the guilt or innocence of the accused. These he did indeed couch in such a way as to make fairly apparent what answers he would himself have given to them; and it must be owned that the answers were damaging. The questions were, however, the sum of all that could be thought to invade the jury's province, and they occurred in a long charge, prefaced by overabundant caution, as we have said. The situation was thus quite different from that in *United States* v. *Murdock*, 290 U. S. 389—the last pronouncement of the Supreme Court—in which by a divided vote it affirmed the reversal of a conviction in which the judge had told the jury that the prosecution had "proved that this defendant is guilty in manner and form as charged beyond a reasonable doubt" (p. 393). Such an unequivocal declaration upon the very issue had an impact immensely more persuasive than the oblique intimations to be drawn from the questions put to the jury here. The judge did not "distort * * * or add to" the evidence; what he did do was to "comment in order to give appropriate assistance" to the jury. *Quercia* v. *United States*, 289 U. S. 466, 470. Nor is it true that he presented the evidence unfairly. In such cases it is seldom possible to say more in the accused's favor than that he denies any complicity [fol. 47] with the chief participants in the scheme; the real question is how far the prosecution has succeeded in enmeshing him in a web of circumstance strong enough to withstand those denials. While the judge might have pointed out possible holes in that web, "fairness" does not mean neutrality; he was in some measure responsible for the result, and his conclusions—though he really told them none—if presented, without heat or bias were a proper guide to the jury. (The belief very commonly held by judges that a jury is excessively subject to the judge's influence, my own experience at least did not bear out. I found them generally quite robust enough to form their own opinions independently of any indications I might give them of mine.) In our decisions we have repeatedly gone farther than the judge did here. *Safford* v. *United States*, 252 Fed.

Rep. 471; *Dillon* v. *United States*, 279 Fed. Rep. 639 (this decision was probably overruled by *United States* v. *Murdock*); *United States* v. *Frankel*, 65 Fed. (2) 285, 288; *United States* v. *Dilliard*, 101 Fed. (2) 829, 835; *United States* v. *Bob*, 106 Fed. (2) 37, 41.

Some of the accused argue that there was no "credible" evidence to sustain the verdict; upon the theory that the testimony of Messman and Garrow was not enough. But the credibility of even such witnesses as they is for the jury; whether their testimony should satisfy all reasonable doubts is not a matter which the courts will review. In the case at bar nobody disputes that a number of persons did actually engage in a wide scheme to defraud the insurance companies; or that all the accused were associated in one way or another with those who concocted it. Whether that was a guilty or an innocent association was the only question left open, and the testimony was ample that it was a guilty one, if the jury chose to believe the witnesses.

As to Elentuch, he was shown to have been active in the conspiracy at least as late as December, 1936, and he did not prove that his connection ended before his first confes- [fol. 48] sion which was in July, 1937. The present indictment was filed in March, 1940, and was therefore in season, regardless of the first indictment which it superseded. *United States* v. *Strewl*, 99 Fed. (2) 474, 477 (C. C. A. 2).

Finally, we cannot say that on the preliminary hearing the judge unduly limited examination by the accused. It is extremely difficult to glean from the record just what limits he did draw, and how far the accused meant to complain when he drew any. The Supreme Court in *Nardone* v. *United States*, *supra*, 341, 342 (308 U. S. 338) clearly meant that the existence of "taps" should not become an excuse for the exposure before trial of all the prosecution's evidence. As in cases of discovery, criminating evidence, or the theft of trade secrets, there is always theoretically a contradiction in inquiring into the existence of facts the propriety of whose disclosure can strictly be determined only after they are known. For such situations there is no *vade mecum* and the judge must feel his way; he need not allow the same searching cross examination that is ordinarily the privilege of the inquiring party. In the case at bar the judge did indeed express himself once or twice in a way that seemed to restrict the examination unduly; but taking his rulings in bulk together with the accused's complaisance

we cannot say that he held them on too tight a rein. Besides, in the view we take this point is obviously immaterial for two reasons: the prosecution was not shown to have carried its burden of proving how far the "taps" contributed to Messman's or Garrow's breakdown; and the accused had in any event no standing to prevent the calling of either at the trial.

The other errors alleged require no mention.

Convictions affirmed.

[fol. 49] In United States Circuit Court of Appeals, Second Circuit

United States of America, Plaintiff-Appellee,

vs.

Maximilian Goldstein, Benjamin Schwartz, Herman Rubin and Irving Elentuch, Defendants-Appellants

Judgment—Filed June 18, 1941

Appeal from the District Court of the United States for the Southern District of New York

This cause came on to be heard on the transcript of record from the District Court of the United States for the Southern District of New York, and was argued by counsel.

On Consideration Whereof, it is now hereby ordered, adjudged, and decreed that the judgments of said District Court be and hereby are affirmed.

It is further ordered that a Mandate issue to the said District Court in accordance with this decree.

D. E. Roberts, Clerk.

[fol. 50] Supreme Court of the United States, October Term, 1941

No. 256

Order Granting Motion for Leave to Proceed in Forma Pauperis—October 13, 1941

On Consideration of the motion for leave to proceed further herein in *forma pauperis*.

It is Ordered by this Court that the said motion be, and the same is hereby, granted.

Mr. Justice Jackson took no part in the consideration and decision of this motion.

[fol. 51] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1941

No. 256

ORDER ALLOWING CERTIORARI—Filed October 13, 1941

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Mr. Justice Jackson took no part in the consideration and decision of this application.

Endorsed on cover: In *forma pauperis*. Enter petitioners pro se. File No. 45,584. U. S. Circuit Court of Appeals, Second Circuit. Term No. 256. Dr. Maximilian Goldstein, Dr. Benjamin Schwartz, Herman Rubin and Irving Elentuch, Petitioners, vs. The United States of America. Petition for a writ of certiorari and exhibit thereto. Filed July 11, 1941. Term No. 256 O. T. 1941.

FILE COPY

N 256

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IN THE

Supreme Court of the United States

OCTOBER TERM—1941

DR. MAXIMILIAN GOLDSTEIN, DR. BENJAMIN SCHWARTZ, HERMAN RUBIN and IRVING ELENTUCH,

Petitioners,

—against—

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT AND BRIEF IN SUPPORT OF PETITION

THEODORE KIENDL,
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Attorney for Petitioner,
Dr. Benjamin Schwartz

SIDNEY J. LOEB,
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Herman Rubin

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SUBJECT INDEX

	PAGE
Petition for a Writ of Certiorari	1
Statement of Matters Involved	2
Jurisdiction	13
Questions Presented	13
Statutes Involved	14
Reasons for Allowance of Writ	16
Brief in Support of Petition	19
Opinions Below (reprint in Appendix)	19
Jurisdiction	19
Statement of the Case	19
Specification of Assigned Errors to be Urged	20
Argument	20
I. It was error to hold that because petitioners were not parties to the telephone communications intercepted and divulged in violation of Section 605 of the Federal Communications Act, they have no standing to complain of that violation	20
II. It was error to hold that Section 605 of the Federal Communications Act does not prohibit the use upon the trial of evidence obtained by unlawful interception and divulgence in advance of trial of telephone conversations as against defendants who were not parties to the communications	25

PAGE

III. The Court below erred in holding that the District Court did not unduly limit the scope and conduct of the preliminary hearing 27

IV. The Court below erred in holding that the charge of the District Court was not prejudicial to the rights of these petitioners 28

Conclusion 30

Appendix:

Opinion in Circuit Court of Appeals for the Second Circuit 31

TABLE OF CASES CITED

Connolly v. Medalie, 58 F. (2d) 629 22

Murdock v. United States, 290 U. S. 389 (1933) 13

Nardone v. United States, 302 U. S. 379 (1937) .. 16, 23, 24

Nardone v. United States, 308 U. S. 338 (1939) .. 3, 8, 10, 14, 16, 20, 22, 23, 25, 26, 27

Nardone v. United States, 106 F. (2d) (1941) 22

Olmstead v. United States, 227 U. S. 438 (1928) 22

Quercia v. United States, 289 U. S. 466 (1933) 13, 29

Silverthorne Lumber Co. v. United States, 251 U. S. 385 (1920) 16, 26

Weeks v. United States, 232 U. S. 383 (1914) 23

Weiss v. United States, 308 U. S. 321 (1939) 2, 5, 16, 20, 21, 23

PAGE

United States v. Bernava, 95 F. (2d) 310 (C. C. A. 2nd, 1938) 21

United States v. Seeman, 115 F. (2d) 371 (C. C. A. 2nd, 1940) 21

United States v. Weiss, 103 F. (2d) 348, (C. C. A. 2nd, 1939) 2, 7

United States v. Weiss, 34 Fed. Supp. 19 (S. D. N. Y. 1940) 3

STATUTES CITED

Constitution of United States:
Fourth Amendment 22, 23

Federal Communications Act (Ch. 652, 48 Stat. 1064, 1103; U. S. C. Title 47, Section 605) 2, 8, 13, 14, 15, 16, 20, 21, 22, 23, 24, 25, 26, 28

Section 240 (a) Judicial Code, as amended, U. S. C. Title 28, Section 347 ..... 13, 19

18 U. S. C., Section 88 1

18 U. S. C., Section 338 1

U. S. C. C., Section 215 1

U. S. C. C., Section 37 1

IN THE

Supreme Court of the United States

OCTOBER TERM—1941

DR. MAXIMILIAN GOLDSTEIN, DR. BENJAMIN SCHWARTZ, HERMAN RUBIN and IRVING ELENTUCH,

Petitioners,

—against—

UNITED STATES OF AMERICA;

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

To the Honorable Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Your petitioners, Dr. Maximilian Goldstein, Dr. Benjamin Schwartz, Herman Rubin and Irving Elentuch, respectfully pray for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit, to review a judgment of that Court entered on June 18th, 1941, affirming a judgment of the District Court of the United States for the Southern District of New York, entered on July 30, 1940, convicting the petitioners of the crimes of using the mails to defraud, in violation of 18 U. S. Code, Section 338, U. S. C. C. Section 215, and of conspiracy to commit an offense against the United States, to-wit, to use the mails to defraud, in violation of 18 U. S. C., Section 88, U. S. C. C. Section 37.

Statement of Matters Involved.

Petitioners, with others, were indicted on thirty counts, twenty-nine of which charged petitioners with using the mails pursuant to an alleged scheme to defraud life insurance companies by inducing them to pay false claims for disability and health and accident benefits under insurance policies. The thirtieth count charged petitioners with conspiracy to do so. The alleged conspiracy and scheme to defraud charged in the indictment covered a period from June 1, 1931, to and including the date of the filing of the indictment on March 22, 1940.

Petitioner Goldstein was convicted on counts "17", "18", "21"-"25" and "30." Petitioner Schwartz was convicted on counts "3", "12-13", "24-25" and "30". Petitioner Rubin was convicted on counts "24-25" and "30". Petitioner Elentuch was convicted on counts "19-20" and "30". The jury recommended leniency.

A brief summary of certain proceedings which took place prior to the trial of this action is essential to an understanding of the issues here presented.

In 1938 petitioner Goldstein, together with one Joseph J. Weiss and others, was tried for a similar crime. In the course of that trial the Government introduced evidence of intrastate telephone conversations obtained by interception ("wiretapping") carried out under the supervision of federal agents. All the defendants were convicted, and the Circuit Court of Appeals for the Second Circuit affirmed their conviction. (*U. S.* v. *Weiss, et al.*, 103 F. (2) 483 (C. C. A. (2) 1939).) This Court, however, reversed the conviction upon the ground that Section 605 of the Federal Communications Act (L. 1934, Ch. 652, 48 Stat. 1064, 1103; U. S. C., Tit. 47, §605) rendered such evidence inadmissible. *Weiss* v. *U. S.*, 308 U. S. 321 (1939).

Thereafter a new indictment was handed down against Weiss, petitioner Goldstein and others. At the opening of

the trial of that indictment the defendants, pursuant to the rule established by this Court in *Nardone* v. *U. S.*, 308 U. S. 338 (1939), applied to the trial court for the following relief:

(a) To suppress all records and transcripts of intercepted telephone messages.

(b) To direct the United States to submit to an examination with respect to the uses made by it of the intercepted messages and the facts ascertained by it from such use.

(c) To suppress all evidence obtained by the United States as a result of the use by it of said intercepted messages, and to suppress the testimony of all witnesses whose recollection was refreshed or whose testimony was aided by means of those messages.

The District Court conducted a preliminary hearing, at which various witnesses were examined, for the purpose of determining the extent to which the Government's evidence had been obtained, directly or indirectly, through the use of the forbidden "wire tapping". At the conclusion of the hearing, a decision was rendered. (*U. S.* v. *Weiss*, 34 Fed. Supp. 99 (S. D. N. Y. 1940).) Thereupon all the defendants in the *Weiss* case, except petitioner Goldstein, pleaded guilty. The Government then abandoned the *Weiss* case and moved the trial of the present indictment, known as the "*Garrow* indictment", to which the present petitioners were parties. This indictment arose out of the same investigation which had resulted in the prior *Weiss* indictment and in another, naming both Garrow and Weiss (R. 388).

Upon the opening of the trial of the present case petitioners made an application similar to that which had been made in the *Weiss* case (R. 103-108), and a similar preliminary hearing was held before the same District Judge.

Pursuant to stipulation (R. 114-115) portions of the testimony taken at the *Weiss* preliminary hearing were read into evidence. Certain additional witnesses were called. The Government conceded that "wire tapping" had been employed, and that approximately a thousand telephone communications had been intercepted and recorded. It is unquestioned that the consent of the "sender" was not obtained. During the course of the hearing the Court made various rulings with respect to the conduct of the hearing and the scope of the examination of witnesses of which petitioners complain and which are hereinafter discussed.

At the conclusion of the hearing the District Court rendered a decision granting the defendants' motion only to the extent of suppressing the actual records and transcripts of the intercepted communications (R. 613-615). Defendants duly excepted to the denial of the balance of their motion (R. 615).

The trial of the indictment then ensued. Petitioners contended that the two principal Government witnesses, Dr. Hirsch L. Messman and Elias Garrow, were incompetent to testify upon the ground that (1) they had been induced to plead guilty and to testify for the Government as the result of being confronted with records of their telephone communications which the Government had illegally intercepted, and (2) that their testimony had been strengthened and their recollections refreshed by the use of the records of the intercepted messages and by information derived from that source. The question of the competency of these witnesses was raised by appropriate objection and exception. (As to Messman, R. 962; as to Garrow, R. 2110; as to both, R. 5081-2.) The District Court permitted these witnesses to testify.

The principal claims of error which petitioners urged in the court below and which they urge here are (1) that Messman and Garrow should not have been permitted to testify,

(2) that the Court unduly restricted the scope of the preliminary hearing and unduly limited petitioners' examination of witnesses at that hearing, and (3) that the Court's charge to the jury was highly prejudicial to the rights of these petitioners.

I.

It may be noted that the Dr. Messman who testified here is the same Dr. Messman who testified for the Government in the *Weiss* case. In its opinion in that case, this Court took occasion to refer to the circumstances under which Messman became a Government witness as follows (308 U. S. 325):

> "It appeared at the trial that one of the defendants who pleaded guilty had been confronted with the phonograph records and then decided to plead guilty and become a witness for the Government. Others who had been informed of the Government's possession of the records did likewise."

This Court further stated, with reference to Messman, (p. 330):

> "Certain of the defendants who were participants in the telephone conversations were informed of the Government's possession of the contents of their communications. Under the stress of this situation they determined to turn state's evidence."

At the preliminary hearing in the case at bar, Messman was examined as to the circumstances under which he had decided to plead guilty. The record shows that upon his arrest in May 1937 he was brought before an Assistant United States Attorney (R. 128-35, 483-93) and that the latter said to him (R. 319) (Government's Exhibit BB for identification):

"That is exactly what we want. I am telling you before we go any further that there is no use of us kidding each other. *We have watched your telephone; we have watched all these lawyers' telephones; we have had rooms tapped. We know what is going on.* We are not stabbing in the dark. *If you want to hear your voice on a record we will be glad to play it.* In your instance, Doctor, there is so much to cover. You have been in this for so many years that we feel that in order for you to help yourself, since you are considered one of the principals here, it would be wise for you to indicate to us whether you intend to tell us everything and come clean, or whether you intend to play ball with the Garrows and the rest of the crowd. We feel that you can be of great value and you want to help yourself. That is straight talk." (Italics supplied.)

The record further shows that following this conversation Messman was put in a cell with other defendants, including one Benjamin Nelson. Nelson told him that he had been brought before the United States Attorney and that they had played a phonograph record of a telephone conversation in which he participated. They had also told him that this record was only a sample (R. 431). Nelson told Messman "They have an awful lot of evidence against us" (R. 431).

After this conversation with Nelson, Messman saw the United States Attorney and decided to confess (R. 432, *et seq.*).

The prosecutor, John F. Dailey, who testified in the preliminary hearing, stated that Messman had been advised of the existence of the intercepted messages "either for the purpose of getting him to plead guilty or to get him committed to one set of answers in case he decided to go to trial" (R. 159).

In view of these facts, it is manifest that no reliance can be placed on Messman's statement at the preliminary hearing that his decision to plead guilty was not influenced by his knowledge of the existence of the incriminating telephone conversations in which he had participated (R. 520). This is particularly apparent in view of the further facts that Messman was an admitted habitual and accomplished perjurer (R. 1263, 1265, 1271, 1300, 1301), and that he had been drawing a salary from the Government from the time of his arrest down to the date of his testimony in the case at bar (R. 967, 1278, *et seq.*).

With regard to Garrow the evidence which petitioners were able to adduce at the preliminary hearing was somewhat weaker. It did appear, however, that at the time Garrow pleaded guilty and decided to testify for the Government, he knew of the existence of the intercepted messages (R. 335). It is also significant that his decision to plead guilty was made within ten days after the Circuit Court of Appeals had held in the *Weiss* case, 103 F. (2) 348 (the decision later reversed by this Court), that intercepted intrastate telephone communications were admissible (R. 3013). In any event, the question of the extent to which the use of "wiretaps" induced Garrow's plea of guilty is no longer important; in view of the decision of the Court below with respect to the testimony of Messman.

The Circuit Court of Appeals held:

(1) That the testimony of Messman and Garrow "was so vital to the case that the convictions cannot survive if the prosecution should not have been permitted to call either" (Opinion, p. 1239).

(2) That the District Court should have forbidden the prosecution to call Messman "and probably Garrow as well, though as to him we need make no finding," on the ground that the Government failed to satisfy the burden which

rested on it of proving that the confrontation of these witnesses with the records of the intercepted messages had no substantial part in influencing them to plead guilty and testify for the Government. (Opinion, pp. 1241-2).

The Court affirmed the convictions, however, on the ground that petitioners had no right to complain of this use by the Government of the illegally intercepted telephone communications because petitioners were not parties to the communications thus used. The Court held that only persons who participate in conversations intercepted and divulged contrary to the provisions of Section 605 of the Communications Act have a standing to complain of the violation of that act.*

As an alternative ground for its conclusion, the Circuit Court of Appeals held that the use to which the Government had put the intercepted communications in the case at bar did not violate Section 605. The Court held, despite the provisions of the fourth subdivision of Section 605, and despite the decision of this Court in *Nardone* v. *U. S.*, 308 U. S. 338, that Section 605 merely forbids a divulgence of an intercepted message upon the trial of the action, and

* We may point out that the Record does not wholly sustain the assumption of the Court below that, as a matter of fact, these petitioners were not parties to any of the intercepted messages. At the preliminary hearing the Government stipulated that 24 of the intercepted communications "have to do with" petitioner Goldstein, 35 with petitioner Rubin, and 2 with petitioner Elentuch. (R. 148). The prosecutor further stipulated that the foregoing tabulation included messages in which these petitioners' names may have been mentioned, "or" to which they were parties. (R. 610). Furthermore, it is the fact, although it is nowhere so stated in the Record, that petitioner Goldstein was a party to at least 8 of the intercepted messages and petitioner Rubin to 15.

The question of *locus standi* was not raised or discussed in the District Court, or even raised by the Government on the appeal. Petitioners do not base this application for a writ of *certiorari*, however, upon any claim of incorrectness in the basic fact upon which the decision of the Court below was predicated. Petitioners' application is based upon the unsoundness of that decision as a matter of law, and for that purpose they are willing to assume the facts to be as stated in the Court's opinion.

that the statute does not prevent any use by the Government of an intercepted message which has been divulged prior to the trial at least as against defendants who are not parties to the intercepted message. (Opinion, p. 1246).

II.

The rulings of the District Court with respect to the conduct and scope of the preliminary hearing unduly hampered petitioners' efforts to develop proof in support of their contention that the Government's evidence had been obtained, directly or indirectly, as a result of the use of illegally intercepted telephone messages. The District Court ruled that petitioners would not be permitted to cross examine witnesses who had testified that the Government's case had an origin independent of wiretapping. (R. 126, 153, 175, 180). An attempt to limit witnesses to stating evidence rather than their own conclusions was prevented by the Court. (R. 257, 280). The unrestrained expression of witnesses' opinion was permitted. (R. 256, 301, 308, 626, 675, 753 *et seq.*, 757-60).

The Court refused to permit petitioners to inspect numerous documents to ascertain how thoroughly interwoven illegal strands of evidence were with legal strands of evidence (Prelim. Hearing Exhibits, Shea's Report, not marked [R. 292-3] and Exhibits BB [R. 323], DD [R. 340], EE [R. 370], 1, 5, 6). The Court examined these documents but would not permit petitioners to see them. The full import of the material which they contained could only be decided by petitioners, particularly since independent reading by a Judge unfamiliar with the ramifications of the case could be of no assistance in determining whether any particular evidence had been derived from the tainted source. Only where wiretapping was expressly mentioned or where the Government gave its consent were petitioners permitted to examine even portions of documents. (See R. 131-2, 136, 137-8, cf. 150, 291, 309, 340).

This was particularly prejudicial in view of the fact that the petitioners were trying to show that wire tapping had entered into the preparation of the case even prior to the time it had been brought to the United States Attorney's office, after which time wiretapping was admittedly conducted with the Government's knowledge and assistance.

The insurance companies had obtained an informer named Kipnis, who is alleged to have given a story which obviously "would not be believed unless thoroughly corroborated" (Opinion, p. 1237).

Wiretaps were used by the insurance companies to obtain that corroboration. After the matter was brought to the United States Attorney's office, wiretapping was employed under the Government's supervision, taps being placed on the offices of Garrow, Dr. Messman and the home and office of Joseph J. Weiss (R. 101-102, 148, 781).

Petitioners contended that the taps, in addition to being used to break down Messman and Garrow, had served the purpose of furnishing clues and leads to refresh the recollection of these witnesses and others and to obtain additional information. In fact, it was claimed that the illegal taint attached to every bit of the Government's evidence.

The Circuit Court of Appeals held (Opinion, p. 1248) that despite the fact that the District Court "did indeed express himself once or twice in a way that seemed to restrict the examination unduly" nevertheless he did not so conduct the hearings as to violate the general principles announced by this Court in *Nardone* v. *U. S.*, 308 U. S. 338 (1939). Moreover, the Court held that any question as to the conduct of the hearing was immaterial, in view of the fact that the petitioners had no standing to complain of the use to which the intercepted messages were put.

III.

The Court's charge to the jury was highly prejudicial to the rights of these petitioners. The Court summarized those portions of the Government's evidence most damaging to petitioners Schwartz and Goldstein without referring to the contradictory evidence which they had offered in their own behalf. The Court used the technique of asking rhetorical questions. Of these the Circuit Court of Appeals said (Opinion, p. 1247): "These he did indeed couch in such a way as to make fairly apparent what answers he would himself have given to them; and it must be owned that the answers were damaging."

Thus, for example, the Court first painted the witnesses, Messman and Garrow as "crooks" and elaborated upon their "low moral character" (R. 5132). He pointed out that both Drs. Goldstein and Schwartz had dealt with Messman and Garrow over a period of three years, Messman and Garrow having brought various patients to them in their capacities as consultants. The Court then said (R. 5145):

> "I suggest that you turn your minds back to Messman and Garrow as you observed them. I think that together they were on the witness stand a matter of about three weeks. I think you had an ample opportunity for appraising them. What do you say as to the impression that they would be likely to create on consultants? Would consultants be able to observe, during a period of dealing with those men, what their essential qualities were? Is it likely that the defendants Goldstein and Schwartz were sufficiently equipped with the powers of perception to fairly well appraise Garrow and Messman?"

The Court made no mention of petitioners' denial of knowledge of the true characters of Messman and Garrow.

Furthermore, the Court did not point out that these petitioners, if their testimony were true, had not had the jury's opportunity to appraise Garrow and Messman in the light in which they appeared at the trial. Nor did the Court point out that the testimony of Messman and Garrow should be weighed in the light of their admittedly bad character as against the testimony of these petitioners who concededly bore good reputations. The Court in effect suggested to the jury that petitioners were guilty because they had done business with persons who, years later, admitted their guilt on the witness stand. (R. 5144).

The Court proceeded to call attention to specific portions of the Government's evidence, which necessarily gave that evidence an excessive importance to the jury. With reference to petitioner Goldstein the Court stated that the testimony of one of the Government's witnesses, Fradkin, was "worthy of the attention of the jury". (R. 5149). The Court emphasized that petitioner Goldstein had been unable to produce his records in the Fradkin case. The Court failed, however, to mention petitioner's explanation of that fact, nor did he remind the jury that the Government in fact possessed and introduced in evidence a copy of the record. (R. 4000).

Similarly the Court called the attention of the jury to a certain letter written by petitioner Goldstein to petitioner Rubin. (Government's Exhibit 232; R. 5152). The Court failed to present the version of petitioners Goldstein and Rubin as to this transaction. (R. 4177, 4207, 4355).

With reference to petitioner Schwartz the Court emphasized a portion of the Government's evidence relating to one Kaplan, a patient whom Schwartz had treated. (R. 5146). He pointed out that there was evidence that certain sputum had been fraudulently substituted in Kaplan's case. He failed to mention Schwartz's testimony as to his actions when this matter had been brought to his attention. (R. 3696).

The Court also stressed certain evidence relating to an electrocardiogram taken of a patient of Schwartz which bore the notation "This suggests digitalis". The Court asked a series of questions which clearly indicated that in his opinion the existence of this notation should have indicated to Schwartz that the patient's claim was fraudulent. He failed to mention the fact that defendants' evidence showed that prior to the return of the indictments in this case very little was known as to the effect of digitalis upon electrocardiograms. (R. 4129-33).

The Circuit Court of Appeals held that this charge did not constitute prejudicial error, on the ground that the District Court gave the jury only "oblique intimations" (Opinion, p. 1247) as to his views of the defendants' guilt, rather than direct statements thereof, and that consequently the case was to be distinguished from *Murdock* v. *U. S.*, 290 U. S. 389 (1933), and *Quercia* v. *U. S.*, 289 U. S. 466 (1933).

Jurisdiction.

The judgment of the Circuit Court of Appeals now sought to be reviewed was entered on June 18, 1941. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended, U. S. C. Title 28, Section 347.

Questions Presented.

I.

Did the Court below err in holding that petitioners who were not parties to telephone communications intercepted and divulged in violation of Section 605 of the Federal Communications Act have no standing to complain of the violation of that statute?

II.

Did the Court below err in holding that Section 605 of the Federal Communications Act does not prohibit the use upon the trial of evidence obtained by unlawful interception and divulgence in advance of trial of telephone communications as against defendants who were not parties to the communications?

III.

Did the Court below err in holding that the District Court did not unduly limit the scope and conduct of the preliminary hearing held in accordance with the rule announced by this Court in *Nardone* v. *U. S.*, 308 U. S. 338 (1939).

IV.

Did the Court below err in holding that the charge of the District Court was not prejudicial to the rights of these petitioners?

Statutes Involved.

Section 605 of the Federal Communications Act (Ch. 652, 48 Stat. 1064, 1103; U. S. C. Title 47, Section 605) provides as follows:

"§605. Unauthorized publication or use of communications.

No person receiving or assisting in receiving, or transmitting, or assisting in transmitting, any interstate or foreign communication by wire or radio shall divulge or publish the existence, contents, substance,

purport, effect, or meaning thereof, except through authorized channels of transmission or reception, to any person other than the addressee, his agent, or attorney, or to a person employed or authorized to forward such communication to its destination, or to proper accounting or distributing officers of the various communicating centers over which the communication may be passed, or to the master of a ship under whom he is serving, or in response to a subpoena issued by a court of competent jurisdiction, or on demand of other lawful authority; *and no person not being authorized by the sender shall intercept any communication and divulge or publish the existence, contents, substance, purport, effect, or meaning of such intercepted communication to any person;* and no person not being entitled thereto shall receive or assist in receiving any interstate or foreign communication by wire or radio and use the same or any information therein contained for his own benefit or for the benefit of another not entitled thereto; *and no person having received such intercepted communication or having become acquainted with the contents, substance, purport, effect, or meaning of the same or any part thereof, knowing that such information was so obtained, shall divulge or publish the existence, contents, substance, purport, effect, or meaning of the same or any part thereof, or use the same or any information therein contained for his own benefit or for the benefit of another not entitled thereto*: Provided, That this section shall not apply to the receiving, divulging, publishing or utilizing the contents of any radio communication broadcast, or transmitted by amateurs or others for the use of the general public, or relating to ships in distress. (June 19, 1934 c. 652, §605, 48 Stat. 1103.)" (Italics supplied.)

Reasons for the Allowance of the Writ.

1. The decision of the Court below holding that because petitioners were not parties to the telephone communications intercepted and divulged in violation of Section 605 of the Federal Communications Act, they have no standing to complain of that violation, is a decision upon an important question of federal law which has not been, but should be, settled by this Court.

2. The decision of the Court below upon the aforesaid question is a decision upon a federal question in a way probably in conflict with applicable decisions of this Court. *Nardone* v. *U. S.*, 302 U. S. 379 (1937); *Nardone* v. *U. S.*, 308 U. S. 338 (1939); *Weiss* v. *U. S.*, 308 U. S. 321 (1939).

In *Weiss* v. *U. S.*, 308 U. S. 321 (1939) this Court reversed the convictions of all the appellants, although it appeared from the record, and from the Government's brief (pp. 40-41), that appellant Goldstein was not a party to any of the intercepted telephone communications which this Court held inadmissible. This point was not specifically mentioned in the opinion of this Court.

3. The decision of the Court below, holding that Section 605 of the Federal Communications Act does not prohibit the use upon the trial of evidence obtained by unlawful interception and divulgence in advance of trial of telephone communications, as against defendants who were not parties to the communications is a decision upon a federal question in a way probably in conflict with applicable decisions of this Court. *Nardone* v. *U. S.*, 308 U. S. 338 (1939); *Silverthorne Lumber Co.* v. *U. S.*, 251 U. S. 385 (1920).

4. The decision of the Court below, holding that the District Court did not unduly limit the scope and conduct of the preliminary hearing held in accordance with the rule announced by this Court in *Nardone* v. *U. S.*, 308 U. S. 338, (1939), is a decision upon an important question of federal law which has not been, but should be, settled by this Court.

5. The decision of the Court below, holding that the Judge's charge did not prejudice the rights of the petitioners, so far sanctions a departure by the lower Court from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

WHEREFORE, your petitioners pray that a writ of *certiorari* issue to the United States Circuit Court of Appeals for the Second Circuit, commanding said Court to certify and send to this Court, on a day to be designated, a full and complete transcript of the record and all proceedings of said Circuit Court of Appeals had in this cause, to the end that this cause may be reviewed and determined by this Court; that the judgment of the Circuit Court of Appeals be reversed; and that the petitioners be granted such other and further relief as may seem proper.

Dated, New York, N. Y., July 10, 1941.

DR. MAXIMILIAN GOLDSTEIN

By THEODORE KIENDL,
Counsel for Petitioner,
Dr. Maximilian Goldstein

DR. BENJAMIN SCHWARTZ

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By BENJAMIN KRONENBERG,
Counsel for Petitioner,
Irving Elentuch

IN THE

Supreme Court of the United States

OCTOBER TERM—1941

DR. MAXIMILIAN GOLDSTEIN, DR. BENJAMIN SCHWARTZ, HERMAN RUBIN and IRVING ELENTUCH,

Petitioners,

—against—

UNITED STATES OF AMERICA,

Respondent.

BRIEF IN SUPPORT OF PETITION.

Opinions Below.

The opinion of the Circuit Court of Appeals for the Second Circuit has not yet been officially reported. It is annexed to the certified transcript of the record heretofore filed herein, and is reprinted as an Appendix hereto.

No opinion was rendered by the United States District Court for the Southern District of New York.

Jurisdiction.

The judgment of the Circuit Court of Appeals now sought to be reviewed was entered on June 18, 1941. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended, U. S. C. Title 28, Section 347.

Statement of the Case.

A summary statement of the case is set forth in the petition. A summary of the argument is set forth in the index.

Specification of Assigned Errors to be Urged.

It is intended to urge the following errors:

1. It was error to hold that because petitioners were not parties to the telephone communications intercepted and divulged in violation of Section 605 of the Federal Communications Act, they have no standing to complain of that violation.

2. It was error to hold that Section 605 of the Federal Communications Act does not prohibit the use upon the trial of evidence obtained by unlawful interception and divulgence in advance of trial of telephone communications, as against defendants who were not parties to the communications.

3. It was error to hold that the District Court did not unduly limit the scope and conduct of the preliminary hearing held, in accordance with the rule announced by this Court in *Nardone* v. *U. S.*, 308 U. S. 338 (1939).

4. It was error to hold that the charge of the District Court was not prejudicial to the rights of these petitioners.

Argument.

I.

It was error to hold that because petitioners were not parties to the telephone communications intercepted and divulged in violation of Section 605 of the Federal Communications Act, they have no standing to complain of that violation.

As we have previously stated, the decision of this Court in *Weiss* v. *U. S.*, 308 U. S. 321 (1939) is, in reality, a holding on this point in favor of the petitioners, although the question was not discussed in the Court's opinion. Inasmuch

as the record in that case revealed that petitioner Goldstein was not a party to any of the telephone communications there involved, and inasmuch as this fact was pointed out in the Government's brief (pp. 40-41), this Court necessarily held, in reversing the conviction of petitioner Goldstein, that he had a right to complain of the admission of that evidence. The Court below, of course, appreciated that this question was presented in the *Weiss* case. Nevertheless, it held that the question was not there decided. The Court below said (Opinion, p. 1243):

> "It is indeed always a matter of the greatest delicacy to say that the decision of a superior court is not to be taken as authoritative upon a point not discussed; yet there are occasions when, unless we do so, we shut our eyes to the fact that in every probability it was not decided at all. It seems to us that this is such an occasion, and that the matter is open."

We believe that the Court below should not thus have dismissed the *Weiss* case from its consideration and that it should have followed the actual holding of that case, despite the absence of any specific discussion of the point by this Court. However, even if the contrary be assumed, and if the question be deemed an open one, we believe that the Court below likewise fell into error in deciding that question as it did. We submit that a proper construction of Section 605 requires the conclusion that these petitioners have the right to complain of its violation.*

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* It may be noted that the decision of the Court below is in conflict with another decision of the same Circuit Court of Appeals on the same question. In *U. S. v. Bernava*, 95 Fed. (2nd) 310 (C. C. A. 2nd 1938), the conviction of a defendant who was not a party to an illegally intercepted telephone communication was reversed. A contrary result was reached in *United States v. Seeman*, 115 Fed. (2nd) 371 (C. C. A. 2nd 1940). With the exception of Judge A. N. Hand, the judges who sat in the *Bernava* and *Seeman* cases were different.

The Circuit Court of Appeals based its decision upon a supposed analogy with the rule that has obtained under the Fourth Amendment, that only the owner or possessor of property taken by an illegal search or seizure may seek its return, or may object to its introduction in evidence at a criminal trial. This Court has never expressly passed upon that principle, as the Court below recognized (Opinion, p. 1243), although it has received the approval of various Circuit Courts of Appeal. (See *Connolly* v. *Medalie*, 58 Fed. (2d) 629). In any event we believe that the rule has no application here.

In the first place, it is obvious that the rule is not directly applicable, for the tapping of telephone wires is not a violation of the Fourth Amendment. This Court so held in *Olmstead* v. *U. S.*, 277 U. S. 438 (1928), and when, in *Weiss* v. *U. S.*, *supra*, the appellants asked the Court to reconsider that decision, it found it unnecessary to do so.*

Consequently, the doctrine of the Fourth Amendment cases can be considered here only on the theory that the Fourth Amendment and Section 605 of the Communications Act are so analogous that the limitations of the former must be deemed equally the limitations of the latter. We believe that the fallacy of such a theory can be demonstrated.

That Section 605 is broader in its terms than the Fourth Amendment is apparent at first glance. Thus, the Fourth

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* It may be noted that the opinion of the Court below, in discussing the Fourth Amendment, does not once mention the *Olmstead* case. Yet, in *Nardone* v. *U. S.*, 106 Fed. (2nd) 41 (C. C. A. 2nd 1939) [Rev. 308 U. S. 338 (1939)], in which the Circuit Court of Appeals held that Section 605 does not prohibit the employment of wire tapping as a means of obtaining clues and leads to other evidence, the Court relied on the *Olmstead* decision to distinguish the case at hand from the contrary rule prevailing under the Fourth Amendment. Thus, it would appear that the Circuit Court of Appeals asserts a similarity between Sections 605 and the Fourth Amendment, when to do so would result in a restricted interpretation of Section 605, and denies that similarity when its existence would result in a liberal interpretation of the section.

Amendment forbids only "unreasonable" searches and seizures. The Communications Act does not permit "reasonable" wire tapping. Interception of telephone communications cannot be sanctioned by a warrant.

There is another respect, more important for present purposes, in which the scope of Section 605 exceeds that of the Fourth Amendment. The amendment forbids merely the acquisition of evidence by illegal search. It does not expressly forbid the use of that evidence once it has been acquired. The doctrine which prohibits that use has its origin, not in the language of the amendment itself, but in the judicial decisions which have interpreted it. This Court has held that the safeguards of the Fourth Amendment can be made effective only by permitting the owner of property which has been illegally seized to compel its return, and by forbidding the Government to use it, directly or indirectly, against him. *Weeks* v. *U. S.*, 232 U. S. 383 (1914). The penalty for violation of the amendment could have been made even stronger by forbidding the Government to use evidence so acquired against anyone, whether the owner or not. The lower federal courts have declined to extend the doctrine that far. The point of importance is that they were free to extend it or not as they saw fit.

Section 605, however, permits no such latitude of interpretation. That statute in terms prohibits, not only the acquisition of evidence by interception, but also its subsequent divulgence. Congress has said that "no person" shall divulge the contents of the intercepted communication to "any person". This Court has interpreted that provision to mean that the message shall not be divulged either in court (*Nardone* v. *U. S.*, 302 U. S. 379 (1937); *Weiss* v. *U. S.*, 308 U. S. 321 (1939)), or out of court in advance of trial (*Nardone* v. *U. S.*, 308 U. S. 338 (1939)). There is no room to interpret it as meaning that intercepted messages

shall not be divulged on some occasions but may be divulged on others, or that divulgence as against parties to the communications is forbidden, but as against those who are not parties is permitted. The statute creates no such distinction. It prohibits any divulgence whatsoever.

The purpose of Section 605, as this Court has held (*Nardone* v. *U. S.*, 302 U. S. 379, 383 (1937)) is to forbid the employment by the Government of a particular method of obtaining evidence which is deemed "inconsistent with ethical standards and destructive of personal liberty". That purpose can be implemented only by enforcing the statute in accordance with its unequivocal terms. The construction adopted by the Court below, far from enforcing the will of Congress, in fact nullifies it. If that decision stands, federal prosecutors may continue to "tap" telephone wires, happy in the knowledge that there will surely be some defendant who did not happen to participate in the intercepted conversations, against whom the records of those conversations and all other evidence obtained through their use may be introduced. Indeed, where there are numerous defendants, as is usually the case in indictments of this character, it would be possible to introduce records of a conversation with defendant A as evidence against defendant B, and thereafter to introduce, as against defendant A a conversation with defendant B. Thus, all the communications would be most thoroughly divulged to the jury, and yet the legislative prohibition of divulgence would not be violated.

Such a result seems absurd. Yet it would necessarily follow from the construction given to the statute by the Court below. The Court recognized that "in form the language [of the statute] is indeed imperative". (Opinion, p. 1244). We submit that the Court should have given effect to that imperative language rather than qualify it by reading into the statute a limitation which is not there expressed.

II.

It was error to hold that Section 605 of the Federal Communications Act does not prohibit the use upon the trial of evidence obtained by unlawful interception and divulgence in advance of trial of telephone conversations as against defendants who were not parties to the communications.

In *Nardone* v. *U. S.*, 308 U. S. 338 (1939) this Court held squarely that Section 605 not only prohibits the divulgence of intercepted communications by introducing them in evidence at the trial, but also prohibits a divulgence in advance of trial and use in preparation for the trial of messages so divulged. The Government may not reap the benefit of its violation of the statute by using the intercepted messages as a means of obtaining other evidence. Consequently, the Court held that the District Court must permit the defendants an opportunity to examine the prosecution as to the uses to which it has put the information derived from the intercepted communications. It was in accordance with this decision that the preliminary hearing was held in the case at bar.

Despite that decision the Court below appears to have held that Section 605 is not violated by a use of messages divulged prior to the trial. The Court said (Opinion, p. 1246):

> "We of course do not forget that it is precisely the use of evidence obtained by such divulgence that *Nardone* v. *United States, supra,* (308 U. S. 338) condemned, but the distinction between divulgence of the message by the very act of introducing it, and introducing evidence acquired by past divulgence, is nevertheless critical."

We confess to an inability to understand that distinction. This ground of the decision of the Court below seems to us to be irreconcilable with *Nardone* v. *U. S., supra.*

Moreover, the Court below appears to have overlooked the fact that Section 605 of the Federal Communications Act in its fourth subdivision states:

> "*No person* having received such intercepted communication or having become acquainted with the contents * * * shall divulge or publish * * * or *use the same* or any information contained therein *for his own benefit* or for the benefit of another not entitled thereto."

The Circuit Court of Appeals nevertheless stated that the Federal Communications Act bars only divulgence and not use. Petitioners contend that the Section is clear in its prohibition and its policy has been interpreted by this Court in the second *Nardone* decision as comprehending use as well as divulgence.

Finally, it may be observed that the Circuit Court of Appeals, in reaching its conclusion apparently again relied upon the supposed rule under the Fourth Amendment, stating that (Opinion, p. 1246) "it would be a curious result, if a violation of the section were more sweepingly condemned than a violation of the Constitution." But even under the Fourth Amendment it is well settled that evidence obtained in violation of that amendment not only may not be used at the trial, but may not be used at all. *Silverthorne Lumber Co.* v. *U. S.*, 251 U. S. 385 (1920).

If this passage of the opinion of the Court below actually means what it appears to mean, then the Circuit Court of Appeals has thrown open to the prosecution an invitation to tap telephone wires indiscriminately, despite the prohibition of Section 605. If the Government may make full use of the forbidden evidence in the preparation of its case, provided only that it does not introduce the intercepted messages themselves at the trial, the intent of Congress, as this Court has heretofore interpreted it, will indeed be thwarted.

III.

The Court below erred in holding that the District Court did not unduly limit the scope and conduct of the preliminary hearing.

This is the first case which has arisen since the decision in *Nardone* v. *U. S.*, 308 U. S. 338 (1939) which presents the question of the application of the rule which this Court there laid down. In view of that fact the question is clearly of sufficient importance to warrant decision by this Court.

It is true that under the *Nardone* decision wide discretion is vested in the District Court. There must nevertheless be some limit to that discretion. We believe that in the case at bar that limit was exceeded.

The Court did not permit defendants to cross examine the witnesses who testified at the preliminary hearing, all of whom were obviously hostile. Nor did the Court permit defendants to mark in evidence the various documents produced by the Government at the hearing. Moreover, the Court did not permit defendants to examine those documents. The Court examined them and permitted defendants to see only those portions which specifically referred to intercepted telephone communications. In view of the Court's unfamiliarity with the details of the case, it was manifestly impossible for him to determine whether or not a given document contained evidence which had been obtained indirectly through the use of the forbidden "wiretaps". Thus defendants were prevented from developing evidence as to the actual extent to which the intercepted communications had been used by the Government.

The Court below conceded that the District Judge "did indeed express himself once or twice in a way that seemed to restrict the examination unduly," (Opinion, p. 1249) but held nevertheless "we cannot see that he held them on too

tight a rein." Furthermore, the Court below dismissed the point as immaterial in any event in view of its decision that these petitioners had no standing to complain of the use made by the Government of the intercepted communications.

It would seem that the point is by no means immaterial. For if the defendants' right to complain is indeed an issue, and if it is necessary to determine whether or not they were parties to the intercepted communications, then there is all the more reason for permitting them a thorough examination into the facts. The matter is one peculiarly within the knowledge of the Government. Unless defendants are allowed to cross examine the representatives of the Government, and to peruse the documentary evidence which the Government has assembled, the entire proceeding will be rendered futile. Nor is it a sufficient answer to say that such a procedure will result in the disclosure of the Government's case in advance of trial. A certain measure of disclosure is inevitable, and where it is a question of choosing between the rights of the defendants, guaranteed them by Section 605, and the interests of the Government, the former should prevail, since the choice has been made necessary in the first instance by the wrong of the Government in violating the statute. In the case at bar, however, the District Court gave the Government the benefit of every doubt.

IV.

The Court below erred in holding that the charge of the District Court was not prejudicial to the rights of these petitioners.

In order to illustrate thoroughly the unfairness of the Judge's charge, a detailed discussion of the principal items of evidence introduced on both sides of the case would be required. Obviously petitioners cannot embark on such a discussion here. They feel, however, that even in the ab-

sence of such a summary of the evidence, the mere reading of the charge will disclose that the Court consistently emphasized only that evidence which was favorable to the contentions of the Government. Moreover, no study of the record is necessary to an appreciation of the damaging effect of the technique adopted by the Court. Throughout his charge he asked a series of rhetorical questions, which were phrased in such a way as to admit of only one answer, an answer which was invariably injurious to the petitioners. The Court might as well have told the jury in so many words that he believed each of the petitioners to be guilty. Although the Court's method of conveying this thought was somewhat more subtle than such a blunt statement would have been, it was no less effective.

It appears therefore that in substance the charge of the defendant was analogous to that in *Quercia* v. *U. S.*, 289 U. S. 466 (1933). This Court there held that a charge in a criminal case should not be "one-sided." The charge in this case certainly violated that requirement. The Court below nevertheless sustained the charge on the ground that " 'fairness' does not mean neutrality" (Opinion, p. 1248). We submit that fairness should mean exactly that, and that a charge which presents only one side of the controversy must necessarily be "unfair".

V.

CONCLUSION.

For the reasons stated in the petition and in this brief, it is respectfully submitted that the application for a writ of *certiorari* should be granted.

Dated, New York, July 10, 1941.

Respectfully submitted,

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LESTER R. BACHNER,
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APPENDIX

Opinion Below

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 263—October Term, 1940.

(Argued March 31, 1941 Decided June 2, 1941.)

UNITED STATES,

Appellee,

v.

MAXIMILIAN GOLDSTEIN, BENJAMIN SCHWARTZ, HERMAN RUBIN and IRVING ELENTUCH,

Appellants.

Appeals from judgments of conviction of the District Court for the Southern District of New York, under an indictment for using the mails to defraud and for a conspiracy to do so.

Before:

L. HAND, SWAN and AUGUSTUS N. HAND,

Circuit Judges.

THEODORE KIENDL for Goldstein;

LESTER R. BACHNER for Schwartz;

BENJAMIN KRONENBERG for Elentuch;

SIDNEY J. LOEB for Rubin;

MAXWELL S. MCKNIGHT for the appellee.

L. HAND, *C. J.*:

"These are appeals from convictions for a scheme to defraud—together with a conspiracy to commit the same crime. The scheme was the same as that which was before us in *United States* v. *Weiss*, 103 Fed. (2) 348; but the convictions which we then affirmed were under another indictment and all of the accused except Goldstein were different from those now at bar. The Supreme Court reversed these convictions (*Weiss* v. *United States*, 308 U. S. 321) because of the admission of certain "wire taps," and when the case went back for a new trial, a preliminary hearing was had, following the practice prescribed in *Nardone* v. *United States*, 308 U. S. 338. Before any decision had been made upon the evidence taken at this hearing, J. J. Weiss, one of the accused, pleaded guilty; thereupon the prosecution proceeded under the present indictment, which was then pending, and abandoned the "Weiss" indictment. The evidence already taken was by agreement admitted in a similar preliminary hearing begun under this indictment, at the end of which the judge decided that the prosecution should be allowed to call as witnesses two of the prime movers in the scheme, Messman and Garrow, overruling the objection that they had been induced to turn state's evidence by means of records obtained by "tapping" their wires. One of the seven accused pleaded guilty during the trial, but the other six went through to verdict, and the appellants are four of these. The important points raised are (1) that the testimony of Messman and Garrow was procured by "taps," (2) that it did not also appear that the "taps" had not served as clues leading to other evidence which had been introduced, (3) that the judge's charge was not impartial, and (4) that the evidence did not support the verdict.

In order to decide how far the use of the "taps" should have prevented the calling of Messman and Garrow, we

must go back to the original discovery of the frauds. Sometime before August, 1936, a number of large insurance companies, suspecting that they were being victimized, retained two firms of lawyers to run down the culprits. One Bernstein was a member of one of these firms, and in that month a man named Kipnis came to him and made an oral confession which laid bare the outlines of the whole scheme. Kipnis had been one of the insured who had fraudulently collected upon a disability policy, and he had helped a number of others to commit similar frauds. The plan involved the insured's taking digitalis or some similar drug which would make his heart's action simulate disease, and this, together with a proper paraphernalia of cardiograms, hospital records and declarations of symptoms, was enough to evade detection by the insurers. To the success of such a scheme a confederation of lawyers, doctors—including heart specialists—and of course the insured themselves, was necessary. Kipnis inculpated Weiss and Garrow, lawyers, Messman and Goldstein, doctors, and a great many others. His story to Bernstein, as Bernstein gave it, if believed, made a complete case, but obviously he would not be believed unless thoroughly corroborated; and Bernstein set out to procure the necessary corroboration. He instructed Kipnis to keep up a front of continued participation in the scheme and he installed in Kipnis's offices a dictaphone which would record talks with visitors. Besides this, he got records of telephone talks between Kipnis and his confederates, by means of an extension receiver at which a stenographer was placed; no machine was interposed in the circuit during this period. Matters went along in this way through August and September, Kipnis meanwhile disclosing to Bernstein numerous fabricated "case histories" of fraudulent claimants. On October 8, 1936, Kipnis made a detailed and lengthy written confession which implicated Weiss, Garrow, Messman, Goldstein and a great many others, and which,

along with his other material, Bernstein shortly thereafter presented to Hardy, the district attorney, who on November 27th, called in a post-office inspector, Shea, to work up the case. On December 6, Shea, without any independent investigation of his own, turned in a report to Hardy in which he declared that there was ground for the indictment of 75 or more persons. Towards the end of January, 1937, Hardy had a conference with Bernstein and the other insurance lawyers at which they decided to begin the regular "tapping" of the wires of the principals in the scheme by introducing recording machines into the circuits; and this went on with some interruptions from that time until the arrest of Messman and Garrow on May 18, 1937, and even later. By these means nearly a thousand records were procured of talks between the confederates, in none of which, however, did any of the appellants at bar take part. The prosecution introduced none of these records in evidence, and they could therefore have contributed to the convictions only in two ways: they might have contained clues leading to the discovery of some of the evidence actually introduced; and they might have served in whole or in part to induce Messman and Garrow to turn state's evidence and become the chief witnesses at the trial. The prosecution denied that they were useful as clues, or that they had helped in any way except as confirmation of information which it already had. The record contains nothing to contradict the testimony of those gentlemen who had prepared the case and who swore that Kipnis's confession, the cardiograms, the insurance files and the hospital records were the sources of all their information. We should not therefore have been justified in sustaining a finding that the "taps" had served as clues, even if one had been made and if the prosecution had the burden of proof upon the issue.

There remains the question whether the "taps" served to break down either Messman or Garrow and turn them into

informers. The testimony of each was so vital to the case that the convictions cannot survive if the prosecution should not have been permitted to call either. Both these men were arrested on May 18, 1937, and Messman was taken at once to the district attorney's office where an assistant examined him. The assistant told him that his telephone and "all these lawyers' telephones" had been "watched"; that he might hear his own voice if he chose; that the prosecution would like to know whether he would tell everything or "play ball" with the accused; and that it knew what was going on and was not "stabbing in the dark." As he did not then break down he was put into the same cell with one, Nelson, another of the confederates, who told him and still another, Gross, that the prosecution had gathered together "an awful lot of evidence" including telephone records in which he, Nelson, had heard a talk of his own with Weiss. There was "too much dirt against us. The government has got everything." After hearing this from Nelson, Messman was on the same day taken back to the assistant's room where he confessed. On the preliminary hearing he denied that the telephone record had had anything to do with his breakdown; he said that he had seen the net gathering about him for some months before his arrest, had decided that his only chance was to plead guilty, turn informer, make what terms he could with the prosecution, and, as to his sentence, to rely upon the help he could give to convict the others. He confessed that he was abandoned in morals, ready to do anything that would serve his turn, and showed himself utterly untrustworthy. It is indeed curious, if he had made up his mind to change front before he was arrested, that he failed to confess when he was first before the district attorney and waited until after Nelson had dilated upon the amount of evidence which had been accumulated against him. One would have expected that on his own story his arrest would have been enough to touch

off his confession. However, if the judge had affirmatively found that the "taps" contributed nothing to this result, we should not have disturbed the finding; it is not impossible that although from the start he meant to confess, he might not have seized the first moment to do so. The difficulty is that it does not appear that the judge meant to find more than that the accused failed to prove that the "taps" had contributed to the breakdown. For this reason the issue depends upon which side had the burden of proof at the hearing.

The case for the accused is considerably weaker as to Garrow. He too was arrested on May 18, 1937, but he did not confess until nearly two years later. It is true that he did so only a few days after we had held in *United States* v. *Weiss*, 103 Fed. (2) 348, that it was proper to allow the introduction of the "taps," and the argument is not without plausibility that this sequence was causal. Still, he was not subjected to the same pressure as Messman, and like Messman he declared that the "taps" had not influenced him at all, though his word was, if possible, even less reliable. Again, we should not have disturbed an express finding, had there been one, and the issue, like that as to Messman, depends upon the burden of proof. Upon that question we have nothing to guide us but *Nardone* v. *United States, supra* (308 U. S. 338) and that did not actually decide the question. It is true that Mr. Justice Frankfurter did say (p. 341) that the accused had the burden of proving that the prosecution "tapped" the wires, and that if he did, the judge must give him a fair opportunity to show how far the "taps" had infiltrated into the case. He added, however, that after this had been done it would leave "ample opportunity to the Government to convince the trial court that its proof had an independent origin." That language cannot indeed serve as a ruling that the prosecution has the burden to show how far its proof has "an independent

origin," but it is consonant with that position, and to some extent suggests it. In any event it appears to us that this should be the rule in analogy to the well settled doctrine in civil cases that a wrongdoer who has mingled the consequences of lawful and unlawful conduct, has the burden of disentangling them and must bear the prejudice of his failure to do so; that is, that it is unfair to throw upon the innocent party the duty of unravelling the skein which the guilty party has snarled. To impose the duty upon the prosecution is particularly appropriate here, for it necessarily has full knowledge of just how its case has been prepared; given a *prima facie* case against it, i. e., "taps" and some use of them, it should do the rest. It is true that the tendency has of late been to mollify the extreme of this requirement, substituting the best honest guess for a quantitative allocation when that is obviously impossible, so that the victim shall not get what cannot possibly be his. *Sheldon* v. *Metro-Goldwyn Pictures Corp.*, 309 U. S. 390. But there has been no disposition to relax that feature of the doctrine which resolves all possible doubts against the wrongdoer. We content ourselves with citing some of those decisions which expressly state the reasoning. *The Idaho*, 93 U. S. 575, 585, 586; *Schnell* v. *The Vallescura*, 293 U. S. 296, 306, 307; *Brainard* v. *Cohn*, 8 Fed. (2) 13, 15 (C. C. A. 9); *United States* v. *Federal Mail Order Corp.*, 47 Fed. (2) 164, 165 (C. C. A. 2); *Samson* v. *Rose*, 65 N. Y. 411, 421; *Wellock* v. *Cowan*, 246 Mich. 45. We hold therefore that, after the accused had proved that the "taps" had been made and had to some extent been used to break down Messman and to a less degree Garrow, the burden fell upon the prosecution to satisfy the district judge that they had no part, or no substantial part, in that result. This being true, and the condition of the findings and the evidence being what we have described above, we hold that, as the record stands, the judge should have forbidden the prosecution to

call Messman, and probably Garrow as well, though as to him we need make no finding. In so deciding we assume that the accused were entitled to invoke the protection of §605, and that assumption we shall now consider.

The authorities on that question are very few. In *United States* v. *Seeman*, 115 Fed. (2) 371, 374, we expressly held that §605 merely conferred a privilege personal to the "sender," though we had without discussion decided the opposite once before. *United States* v. *Bernava*, 95 Fed. (2) 310. Our own decisions are not, however important if the Supreme Court has ruled otherwise; and the question is how far the reversal, even as to Goldstein, in *Weiss* v. *United States*, *supra* (308 U. S. 321), must be taken as a holding the opposite of our ruling in *United States* v. *Seeman*, *supra*. Although, as we have said, Goldstein's wires had never been "tapped," Weiss's had been repeatedly; and there were three records of talks in which Gross had had a part and three in which Krupp had. As to Weiss it therefore was clearly necessary to decide the chief point which the court discussed; i. e. whether the statute applied to intrastate messages. As to him it was necessary to discuss the second point also—the validity of Messman's consent. All this was likewise true of the records of the talks with Gross and Krupp. As to Goldstein alone did the decisions of these questions therefore become immaterial, assuming that §605 is limited to a personal privilege of the "sender." This made it very natural for a court to disregard that point even though, as was the case, the prosecution raised it in its brief. Strictly it would indeed have been still possible to affirm Goldstein's conviction and reverse the others', but the result would have been extremely harsh. It would have presupposed that a fair trial of the others could have been had, though the forbidden records were actually introduced in evidence provided that the jury had been admonished to use them only against Goldstein. Such an admonition

would have been practically valueless in a case like this, and the court might well have refused to affirm Goldstein's conviction when, if the trial had been fairly conducted throughout, the records would not have gone into evidence at all. It is indeed always a matter of the greatest delicacy to say that the decision of a superior court is not to be taken as authoritative upon a point not discussed; yet there are occasions when unless we do so, we shut our eyes to the fact that in every probability it was not decided at all. It seems to us that this is such an occasion, and that the matter is open.

Our reasons for thinking that if it is open, the convictions may stand are as follows. It is well settled that, although the victim of a search, unlawful under the Fourth Amendment, has a privilege to exclude any evidence against him procured in its course, the privilege is personal to him, and that no one else can avail himself of the violation, however scandalous that may have been. In *Connolly* v. *Medalie*, 58 Fed. (2) 629, we so decided and collected the cases up to that time which were very numerous and unanimous; and there has been no divergence since that time. Although the Supreme Court has never expressly passed upon that question, it has dealt with the privilege against self crimination under the Fifth Amendment in the same way. *Hale* v. *Henkel*, 201 U. S. 43, 69, 70. It is true that these privileges are considered as in part sanctions against the violation of the Constitution—being, in the case of searches, additional to the criminal sanctions imposed by statute (§§53a, 630 and 631, Title 18) and it is also true that they could have been made still stronger by forbidding the use of the evidence against everyone. Immunity was not carried so far; it was thought enough if only the injured person is protected. This was in accord with the law of privileged communications generally, for the communication is not itself privileged, only its disclosure. An eavesdropper, or a se-

creted dictaphone, may record and repeat whatever is said, whether the communication be between attorney and client (*Rex* v. *Simons*, 6 C. & P. 540; *State* v. *Center*, 35 Vt. 378, 382, 386; *Hoy* v. *Morris*, 13 Gray 519), between spouses (*Commonwealth* v. *Wakelin*, 230 Mass. 567, 574; *Knight* v. *State*, 114 Ga. 48; *Commonwealth* v. *Eversen*, 123 Ky. 330) or between physician and patient (*Springer* v. *Byram*, 137 Ind. 15). Furthermore, if a witness who should claim the privilege fails to do so, his testimony is competent and its admission is not an error of which a third party may complain. Wigmore §2196. True, when the witness does claim the privilege and it is erroneously overruled, apparently a majority of courts make the error available to third parties, but there can be no doubt that Professor Wigmore is right in holding with the minority, unless the third party shares that interest which alone justifies suppression of the truth.

So far therefore as §605 conferred a personal privilege on the "sender," there can be no doubt, it seems to us, that he alone can invoke it. It plainly does confer such a privilege, for the "sender" may consent to the divulgence of the message after it has been unlawfully intercepted. (The discussion of the second point in *Weiss* v. *United States*, *supra* (308 U. S. 321) presupposed exactly that; and it necessarily follows from the "sender's" privilege to divulge messages which have not been intercepted at all.) The question thus comes down to whether, when the "sender" has not consented, a third party may vicariously invoke the prohibition for his own protection. In form the language is indeed imperative: "no person not being authorized by the sender shall intercept * * * and divulge or publish" the message; moreover §501 makes divulgence a crime. In this respect §605 is therefore unlike those statutes which punish an unlawful search, but which do not punish the use of the evidence procured. Yet, although there cannot for this reason be any question that only the consent of

the "sender" will condone the divulgence of an intercepted message, it does not follow that anyone else can complain of the wrong. Certainly "senders" alone are within the protected class (if it were not so, their consent would not excuse divulgence) and the purpose could not have been more than to protect the secrecy of their talks. For example, nobody but a "sender" could sue civilly for a violation of the section. *St. Louis & San Francisco R. R. Co.* v. *Conarty*, 238 U. S. 243; *Lang* v. *New York Central R. R. Co.*, 255 U. S. 455; *Gorris* v. *Scott*, L. R. 9 Ex. 125; *Boronkay* v. *Robinson & Carpenter*, 247 N. Y. 365; Restatement of Torts §286. Nor can it be urged as a distinction that that doctrine is limited to cases where a party seeks affirmative relief for a violation of the statute; for that is what the accused at bar are seeking. The proscribed evidence, taken by itself, is entirely competent, and could be produced but for its wrongful acquisition; the accused must persuade the court to forbid its use; they ask a remedy for a wrong done to them and they must have some standing to complain. They have no standing unless they can show an interest which will be invaded by the divulgence and which the law will recognize. They do indeed have an interest which is invaded, but it is not one that the law will recognize. It is nothing better than that evidence, which shows them to have committed a crime, shall be suppressed because they are deeply interested in not being punished for that crime. If they were defendants in an equity suit, they might succeed, for a defendant in equity need not be the victim of the wrong which disqualifies the plaintiff to seek an equitable remedy, provided it is closely enough interwoven with the legal transaction involved in the suit. But, so far as we know, there is no doctrine that a criminal prosecution can be defeated by showing that the prosecutors must commit a wrong—civil or criminal—to prove their case. Such considerations are relevant indeed between them and their

superiors, but these the accused does not vicariously represent. Indeed, in this particular application of such a doctrine if it existed, the curious result would be that the event would turn upon which side succeeded in securing the favor of the "sender"—a person who might very well have no interest of his own in the divulgence of the message.

Finally, whatever may be thought of the foregoing, it so chances that in the case at bar the convictions can stand even if the section does so peremptorily forbid divulgence of a message that anyone can take advantage of its violation. This is so because the section prohibits only the divulging of the message, not its use after it has been divulged, and in the case at bar no message was divulged upon the trial. The prosecution had indeed committed a crime earlier, and by hypothesis the evidence it introduced was the fruit of that crime; but that was all in the past and before the trial came on; no further violation of the section were then necessary. We of course do not forget that it is precisely the use of evidence obtained by such divulgence that *Nardone v. United States, supra* (308 U. S. 338) condemned, but the distinction between divulgence of the message by the very act of introducing it, and introducing evidence acquired by past divulgence, is nevertheless critical. For the only possible escape from those authorities which limit to the victim of an unlawful search the objection to evidence procured by the search, lies in the fact that §605 expressly forbids divulgence as well as acquisition—"interception"—while the Fourth Amendment and its implementing statutes forbid only acquisition. When therefore as here the question arises of evidence procured by an earlier unlawful divulgence the parallel between the situation and that of an unlawful search becomes perfect; and it would be a curious result, if a violation of the section were more sweepingly condemned than a violation of the Constitution. Aside from the difference in authority between the two, the wrongs

involved are so different in their heinousness: an unlawful search may be the invasion of the home itself, an outrage which no people will endure which still dares call itself free; the interception of a telephone message, enraging as it is, is not worse than other violations of secrecy which the law countenances.

The only other point which needs extended discussion is the judge's charge. This was long and detailed; he repeatedly advised the jury that they were not to take as authoritative any opinions he might venture as to the facts. He then put before them a number of questions whose answers they might, he thought, find important or even critical in deciding the guilt or innocence of the accused. These he did indeed couch in such a way as to make fairly apparent what answers he would himself have given to them; and it must be owned that the answers were damaging. The questions were, however, the sum of all that could be thought to invade the jury's province, and they occurred in a long charge, prefaced by overabundant caution, as we have said. The situation was thus quite different from that in *United States* v. *Murdock*, 290 U. S. 389—the last pronouncement of the Supreme Court—in which by a divided vote it affirmed the reversal of a conviction in which the judge had told the jury that the prosecution had "proved that this defendant is guilty in manner and form as charged beyond a reasonable doubt" (p. 393). Such an unequivocal declaration upon the very issue had an impact immensely more persuasive than the oblique intimations to be drawn from the questions put to the jury here. The judge did not "distort * * * or add to" the evidence; what he did do was to "comment in order to give appropriate assistance" to the jury. *Quercia* v. *United States*, 289 U. S. 466, 470. Nor is it true that he presented the evidence unfairly. In such cases it is seldom possible to say more in the accused's favor than that he denies any complicity with the chief partici-

pants in the scheme; the real question is how far the prosecution has succeeded in enmeshing him in a web of circumstance strong enough to withstand those denials. While the judge might have pointed out possible holes in that web, "fairness" does not mean neutrality; he was in some measure responsible for the result, and his conclusions—though he really told them none—if presented, without heat or bias were a proper guide to the jury. (The belief very commonly held by judges that a jury is excessively subject to the judge's influence, my own experience at least did not bear out. I found them generally quite robust enough to form their own opinions independently of any indications I might give them of mine.) In our decisions we have repeatedly gone farther than the judge did here. *Safford* v. *United States*, 252 Fed. Rep. 471; *Dillon* v. *United States*, 279 Fed. Rep. 639 (this decision was probably overruled by *United States* v. *Murdock*); *United States* v. *Frankel*, 65 Fed. (2) 285, 288; *United States* v. *Dilliard*, 101 Fed. (2) 829, 835; *United States* v. *Bob*, 106 Fed. (2) 37, 41.

Some of the accused argue that there was no "credible" evidence to sustain the verdict; upon the theory that the testimony of Messman and Garrow was not enough. But the credibility of even such witnesses as they is for the jury; whether their testimony should satisfy all reasonable doubts is not a matter which the courts will review. In the case at bar nobody disputes that a number of persons did actually engage in a wide scheme to defraud the insurance companies; or that all the accused were associated in one way or another with those who concocted it. Whether that was a guilty or an innocent association was the only question left open, and the testimony was ample that it was a guilty one, if the jury chose to believe the witnesses.

As to Elentuch, he was shown to have been active in the conspiracy at least as late as December, 1936, and he did not prove that his connection ended before his first con-

fession which was in July, 1937. The present indictment was filed in March, 1940, and was therefore in season, regardless of the first indictment which it superseded. *United States* v. *Strewl*, 99 Fed. (2) 474, 477 (C. C. A. 2).

Finally, we cannot say that on the preliminary hearing the judge unduly limited examination by the accused. It is extremely difficult to glean from the record just what limits he did draw, and how far the accused meant to complain when he drew any. The Supreme Court in *Nardone* v. *United States, supra,* 341, 342 (308 U. S. 338) clearly meant that the existence of "taps" should not become an excuse for the exposure before trial of all the prosecution's evidence. As in cases of discovery, criminating evidence, or the theft of trade secrets, there is always theoretically a contradiction in inquiring into the existence of facts the propriety of whose disclosure can strictly be determined only after they are known. For such situations there is no *vade mecum* and the judge must feel his way; he need not allow the same searching cross examination that is ordinarily the privilege of the inquiring party. In the case at bar the judge did indeed express himself once or twice in a way that seemed to restrict the examination unduly; but taking his rulings in bulk together with the accused's complaisance we cannot say that he held them on too tight a rein. Besides, in the view we take this point is obviously immaterial for two reasons: the prosecution was not shown to have carried its burden of proving how far the "taps" contributed to Messman's or Garrow's breakdown; and the accused had in any event no standing to prevent the calling of either at the trial.

The other errors alleged require no mention.

Convictions affirmed."

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No. 256

IN THE

Supreme Court of the United States

OCTOBER TERM—1941

DR. MAXIMILIAN GOLDSTEIN, DR. BENJAMIN SCHWARTZ, HERMAN RUBIN and IRVING ELENTUCH,

Petitioners,

—against—

UNITED STATES OF AMERICA,

Respondent.

REPLY BRIEF OF THE PETITIONERS

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INDEX

PAGE

A. The Question Is Raised by This Record 2

B. The Question Is Important 3

C. The Question Was Erroneously Decided by the Court Below 5

CONCLUSION 7

Authorities Cited:

Nardone v. U. S., 308 U. S. 338 (1939) 1, 3, 4, 7

Nardone v. U. S., 302 U. S. 379 (1937) 4

Weiss v. U. S., 308 U. S. 321 (1939) 3, 4, 7

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UNITED STATES OF AMERICA,

Respondent.

REPLY BRIEF OF THE PETITIONERS

The contentions of the Government with respect to the trial court's conduct of the preliminary hearing and his charge to the jury have been anticipated and answered in petitioners' main brief (pp. 27-29). There is no need to repeat those answers here, although we may emphasize that this case presents the first opportunity which has arisen to review the application of the rules laid down by this court in *Nardone* v. *U. S.*, 308 U. S. 338 (1939), governing a preliminary hearing to investigate the Government's use of intercepted telephone communications. By virtue of that fact alone, this case presents a question of sufficient novelty and importance to require the granting of a writ of *certiorari*.

This reply brief is devoted to an analysis of the Government's position upon the first two points raised by the petition, both of which are concerned with the decision of the court below that petitioners have no standing to complain of the Government's interception, divulgence and use of telephone communications.

A. *The Question Is Raised by This Record.*

The Government attempts to avoid this issue, perhaps the most important one in the case, by contending that it is not presented (Br. pp. 13-14). This contention is patently unsound. The Circuit Court of Appeals viewed this case as involving three principal issues: (1) in view of the conceded fact that "wire tapping" had been employed, was the burden upon the Government to prove that the confession and testimony of Messman and Garrow were not procured through the use of the intercepted messages, (2) if so, had the Government satisfied that burden of proof, (3) if not, could that testimony nevertheless be used against these petitioners because of the fact that they were not parties to the messages.

Upon the first two issues the court held that (1) the burden of proof was on the Government; (2) upon the findings and evidence contained in this record, the Government had failed to satisfy that burden. Hence, the court inevitably was called upon to decide the third issue, and only by deciding it adversely to petitioners was the affirmance of their conviction possible.

While it agrees that the burden of proof rested upon it, the Government now urges that the court below should have held that the Government had discharged that burden and hence should not have found it necessary to consider the question of petitioners' status. This comes down to asserting that the decision below should not be reviewed because it is wrong. This is surely a paradoxical argument for the Government to make and, moreover, a fallacious argument as well, for it attributes entirely too great a significance to the particular order in which the court below discussed the three points in its opinion. If it had happened that the Circuit Court of Appeals had first discussed the question of *locus standi*, it could equally well be argued

that there would have been then no occasion for the court to pass upon the issues of the burden and quantum of proof. It is clear that all three questions were in the case, and the order of their decision is wholly immaterial. The fact that two of these questions were decided in favor of petitioners cannot prevent them from seeking a reversal because of the error committed in deciding the third question against them.

B. *The Question Is Important.*

The Government asserts that the problem here involved is not likely to arise again, because it cannot be assumed that henceforth enforcement agencies will intercept telephone messages (Br. p. 16). Certainly, it cannot be assumed that they will not. Past history and experience indicate that the probabilities are that the practice will continue, and, particularly if the decision below is permitted to stand.* That decision has so qualified Section 605, as interpreted by this court in the *Nardone* and *Weiss* cases, that it has rendered evidence obtained by such means admissible in many federal criminal prosecutions. Where evidence is admissible, prosecutors will seek to obtain it. Years of experience under the Fourth Amendment have proved this to be the fact. There is no reason to believe that Section 605 will be any more efficacious in preventing wire tapping than the Fourth Amendment has been in preventing unreasonable searches and seizures.

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* It may be observed that the public press records the disclosure of the tapping of wires by Department of Justice agents as late as August, 1941, in connection with one, Harry Bridges, said disclosure having been made in the course of a hearing before the Senate Judiciary Committee. See New York Times, September 4, 1941, Page 9; New York Herald Tribune, September 4, 1941, Page 8; PM, August 28, 1941, Page 18; August 29, 1941, Page 19, cf. Editorial Comment; PM, September 7, 1941 (Editorial—Labor Section).

Morever, it may be observed that persons other than federal officials have engaged and will engage in wire tapping. Private investigators will continue to avail themselves of this means of obtaining evidence to be laid before prosecuting authorities, and state officials in many states where the practice is countenanced will pursue it. The only effective method of enforcing the will of Congress as expressed in Section 605 is to render evidence thus obtained inadmissible for any purpose against any defendant.

By successive decisions this court has determined three important questions of construction of Section 605. The statute was first held applicable to the disclosure in open court of interstate communications [*Nardone* v. *U. S.*, 302 U. S. 379 (1937)], then to the disclosure in open court of intrastate communications [*Weiss* v. *U. S.*, 308 U. S. 321 (1939)], and finally, to the use of intercepted communications in advance of trial as a means of obtaining other evidence [*Nardone* v. *U. S.*, 308 U. S. 338 (1939)]. This case raises the fourth and final question of importance. Its decision is necessary in order to complete the pattern. The force of the three previous decisions defining the scope of the statute will wane and in some measure impair as long as there is doubt as to whether the protection of the statute is available to all defendants or only to a limited class.

The fact that the question of defendant's standing to complain was actually involved in the *Weiss* case does not obviate the necessity of reviewing the decision in the case at bar. Because of the absence of any discussion of the point in the opinion of this Court in the *Weiss* case, the court below has declined to follow that holding. If the decision below is permitted to stand, it will constitute a precedent for other courts, in spite of the fact that the opinion below contains statements of the law which even the Government concedes to be erroneous. Other judges who

may read only the opinion and not the record in the *Weiss* case may well be unaware of the fact that the point was there presented and may assume that the decision of the court below in the case at bar properly states the rule. Still other courts may take a different view of the decision in the *Weiss* case and hence may reach an opposite result. Uncertainty may be removed only by an express ruling of this Court deciding the issue once and for all.

C. *The Question Was Erroneously Decided by the Court Below.*

The key to the fallacy in the reasoning of the Circuit Court of Appeals is found in the alternative ground which that court gave for its conclusion. The court first construed Section 605 as conferring a privilege personal to the sender of the message. It then held, by analogy with the lower federal court cases construing the Fourth Amendment, that only the sender (*i.e.*, parties to the conversation) could take advantage of the protection of the statute. The court realized, however, that the analogy could be attacked on the ground that the language of the Communications Act was more imperative than that of the Fourth Amendment. Consequently, in an effort to avoid this argument, the court held, as an alternative ground, that in any event the analogy between the Act and the Fourth Amendment was exact as far as the "use" of the intercepted messages prior to the trial was concerned, on the theory that the Act does not expressly forbid "use" and hence is no more explicit in this particular respect than the amendment. The court therefore reached the conclusion that persons not parties to the communication have no right to complain of the "use" of those communications prior to the trial, regardless of what their rights may be in the event that the communications themselves are offered in evidence at a trial.

The conclusion thus reached by the court below is manifestly unsound since, as the Government now concedes (Br. p. 16), the premise upon which it is based is false in fact. Section 605 does expressly prohibit "use". It reads:

> "No person having received such intercepted communication or having become acquainted with the contents, substance, purport, effect or meaning of the same, or any part thereof, * * * shall divulge * * * or *use* the same or any information therein contained for his own benefit or for the benefit of another not entitled thereto".

The court below entirely overlooked this provision. Having overlooked it, it proceeded to find an analogy between the Act and the Amendment where none in fact exists.

The Government's brief does not weaken the force of this significant distinction. It is argued (Br. p. 15) that the Fourth Amendment "as judicially construed" forbids "use" and that hence "there is no reason why a comparable statutory inhibition should require or be given more drastic sanction". Here we have the same type of fallacy as is exemplified by the opinion below. The "statutory inhibition" of Section 605 in fact is *not* comparable to that of the Fourth Amendment. Consequently, the judicial construction which must be given to the statute must be different from that which has been given to the Amendment. Inasmuch as the Amendment does not prohibit use, the lower federal courts could properly construe it as conferring a privilege only upon the owner of the property, which could not be availed of by any third person. Here, however, there is no room for so limited an interpretation.

Finally, the Government suggests that defendants who are not parties to intercepted messages should not be permitted to "inaugurate elaborate collateral inquiries into possible violations of the statutory immunities of other per-

sons". (Br. p. 16). Of course, this begs the question. It assumes that persons other than parties to the communications do not have the benefit of the statutory immunities, which is the very point at issue.

CONCLUSION.

The question raised by this record as to the petitioners' standing to complain is of vital importance in the construction of Section 605. The result reached by the Circuit Court of Appeals has drastically limited the Communications Act and has gone far to undermine the liberal construction of that Act announced by this court in the *Nardone* and *Weiss* cases. Moreover, the construction of the court below, far from being required by the language of the statute, runs counter to its express terms. Therefore this case is an appropriate one for review by this court. The writ of *certiorari* should be granted.

Dated, New York, September ——, 1941.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM—1941

No. 256

DR. MAXIMILIAN GOLDSTEIN, DR. BENJAMIN SCHWARTZ, HERMAN RUBIN and IRVING ELENTUCH,

Appellants,

—*against*—

UNITED STATES OF AMERICA,

Respondent.

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INDEX

PAGE

Opinions Below 1

Jurisdiction 1

Questions Presented 2

Statutes Involved 2

Statement of the Case 4

Preliminary Statement 4

Proceedings Before Trial 5

Facts Developed at the Preliminary Hearing 7

(a) Investigation of the case prior to the arrest of the defendants 7

(b) Uses of the intercepted communications by the Government 9

Decision of the District Court 14

Decision of the Circuit Court of Appeals 14

Specification of Assigned Errors 15

Summary of Points Relied Upon 16

Point I— It was error to hold that because the Appellant Goldstein was not a party to the telephone communications intercepted in violation of Section 605 of the Federal Communications Act, he had no standing to complain of that violation. 17

PAGE

A. The Court below improperly refused to follow the decision of this Court in *Weiss* v. *U. S.*, 308 U. S. 321 (1939) ... 17

B. The Circuit Court of Appeals improperly construed Section 605 as creating a privilege personal to the "Sender" 19

Point II— It was error to hold that Section 605 of the Federal Communications Act does not prohibit the use upon the trial of evidence obtained by unlawful interception and divulgence of telephone conversations in advance of trial at least as against defendants who were not parties to the communications 25

Point III—The Trial Court did not afford the petitioners a fair opportunity to prove that a substantial portion of the Government's evidence was derived from the illegal interception of telephone communications and was not based on independent sources 27

A. The prosecution failed to establish independent sources 28

B. The Court restricted defendants in the preliminary inquiry 31

Point IV— The Court's charge to the Jury was prejudicial to the rights of the Appellant 35

Conclusion 42

Table of Cases Cited:

	PAGE
Dillon v. U. S., 279 F. 639 (C. C. A. 2nd 1921)	41
Goldstein v. U. S., 120 F. (2d) 485 (C. C. A. 2nd 1941)	1
Hitzelberger v. State, 174 Md. 152 (1938)	20
Lovejoy v. U. S., 128 U. S. 171 (1888)	40
Motes v. U. S., 178 U. S. 459 (1900)	18
Nardone v. U. S., 302 U. S. 379 (1937)	22, 24
Nardone v. U. S., 106 F. (2d) 41 (C. C. A. 2nd 1939); rev'd 308 U. S. 338 (1939)	20, 32
Nardone v. U. S., 308 U. S. 338 (1940)	5, 6, 15, 20, 22, 24
Olmstead v. U. S., 277 U. S. 438 (1928)	20
Quercia v. U. S., 289 U. S. 466, 470 (1933)	41
Starr v. U. S., 614 (1893)	40
Stokes v. U. S., 264 F. 18, 25 (C. C. A. 8th 1920)	41
U. S. v. Bernava, 95 F. (2d) 310 (C. C. A. 2nd 1938)	20
U. S. v. Bob, 106 F. (2d) 37 (C. C. A. 2nd 1939); cert. denied, 308 U. S. 589 (1940)	41
U. S. v. Murdock, 290 U. S. 389 (1933)	41
U. S. v. Polakoff, 112 F. (2d) 888 (C. C. A. 2nd 1940); cert. denied 311 U. S. 653	29
U. S. v. Seeman, 115 F. (2d) 371 (C. C. A. 2nd 1940)	20
U. S. v. Weiss, 34 F. Supp. (S. D. N. Y. 1940)	6, 34
U. S. v. Weiss, 103 F. (2d) 348 (C. C. A. 2nd 1939)	5, 12
Weare v. U. S., 1 F. (2d) 617, 619 (C. C. A. 8th 1924)	41
Weiss v. U. S., 308 U. S. 321 (1940)	5, 10, 16, 17, 19, 20, 22

Statutes Cited:

PAGE

Constitution of United States, Fourth Amendment 4, 19, 20, 21, 22, 23, 24, 26

Federal Communications Act, Section 605 (L. 1934 Ch. 652, 48 Stat. 1064, 1103; U. S. C. Title 47, Sec. 605) 2, 3, 5, 15, 19, 20, 21, 22, 23, 24, 25

Judicial Code, Sec. 240(a), as amended, U. S. Code, Title 28, Sec. 347(a) 1

United States Code, Title 18, Sec. 88, U. S. Crim. Code, Sec. 37 4

United States Code, Title 18, Sec. 338, U. S. Crim. Code, Sec. 215 4

Legal Periodicals:

Georgetown Law Journal, Vol. 29, p. 889 (1941) 21

Harvard Law Review, Vol. 53, p. 863 (1940) 17

Harvard Law Review, Vol. 55, p. 141 (1941) 20

Congressional Proposals to Amend Federal Communications Act:

75th Congress, 3rd Sess. 3756 (1938) 21

76th Congress, 3rd Sess. H. J. Res. 571 (1940) 21

77th Congress, 1st Sess. H. R. 2266 (1941) 21

77th Congress, 1st Sess. H. R. 3099 (1941) 21

77th Congress, 1st Sess. H. R. 4228 (1941) 21

87th Cong. Rec. 5911 21

IN THE

Supreme Court of the United States

OCTOBER TERM—1941

No. 256

DR. MAXIMILIAN GOLDSTEIN, DR. BENJAMIN SCHWARTZ, HERMAN RUBIN and IRVING ELENTUCH,

Appellants,

—against—

UNITED STATES OF AMERICA,

Respondent.

BRIEF OF APPELLANT, DR. MAXIMILIAN GOLDSTEIN

Opinions Below.

No opinion was rendered by the United States District Court for the Southern District of New York, before which Court the case was tried.

The Opinion of the Circuit Court of Appeals for the Second Circuit appears in the printed record (fols. 34-48)* and is reported in 120 Fed. (2d) 485.

Jurisdiction.

The judgment of the Circuit Court of Appeals was entered June 18, 1941 (fol. 49).

Jurisdiction of this Court was invoked under Section 240 (a) of the Judicial Code as amended, U. S. C. Title 28, Section 347 (a) by a petition filed July 11, 1941. This Court granted certiorari on October 13, 1941 (fols. 50-51).

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* The printed portion of the Record is noted by folio references; the typewritten portion, by page numbers.

Questions Presented.

1. Whether the appellant, not being a party to the telephone communications intercepted (by "wiretapping") and divulged in violation of Section 605 of the Federal Communications Act, may complain of that violation.

2. Whether Section 605 of the Federal Communications Act prohibits the use upon the trial of evidence obtained by unlawful interception and divulgence of telephone communications in advance of trial, as against appellants who were not parties to the communications.

3. Whether the District Court unduly limited the scope and conduct of the preliminary hearing, thus depriving the appellant of a fair opportunity to prove that a substantial portion of the Government's evidence was derived from the illegal interception of telephone communications rather than from independent sources.

4. Whether the Trial Court's instructions deprived the appellant of a fair trial by emphasizing the evidence of the prosecution and by indicating the Court's views on factual issues submitted to the jury.

Statutes Involved.

Section 605 of the Federal Communications Act (L. 1934, Ch. 652, 48 Stat. 1064, 1103; U. S. C. Title 47, Section 605) provides as follows:

"§605. Unauthorized publication or use of communications.

No person receiving or assisting in receiving, or transmitting, or assisting in transmitting, any interstate or foreign communication by wire or radio shall divulge

or publish the existence, contents, substance, purport, effect, or meaning thereof, except through authorized channels of transmission or reception, to any person other than the addressee, his agent, or attorney, or to a person employed or authorized to forward such communication to its destination, or to proper accounting or distributing officers of the various communicating centers over which the communication may be passed, or to the master of a ship under whom he is serving, or in response to a subpoena issued by a court of competent jurisdiction, or on demand of other lawful authority; *and no person not being authorized by the sender shall intercept any communication and divulge or publish the existence, contents, substance, purport, effect, or meaning of such intercepted communication to any person;* and no person not being entitled thereto shall receive or assist in receiving any interstate or foreign communication by wire or radio and use the same or any information therein contained for his own benefit or for the benefit of another not entitled thereto; *and no person having received such intercepted communication or having become acquainted with the contents, substance, purport, effect or meaning of the same or any part thereof, knowing that such information was so obtained, shall divulge or publish the existence, contents, substance, purport, effect, or meaning of the same or any part thereof, or use the same or any information therein contained for his own benefit or for the benefit of another not entitled thereto*: Provided, That this section shall not apply to the receiving, divulging, publishing or utilizing the contents of any radio communication broadcast, or transmitted by amateurs or others for the use of the general public, or relating to ships in distress. (June 19, 1934 c. 652, §605, 48 Stat. 1103.)" (Italics supplied.)

The Fourth Amendment to the Constitution of the United States provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against *unreasonable searches and seizures,* shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized. (Italics supplied.)

Statement of the Case.

Preliminary Statement.

This appellant, with others, was indicted on thirty counts. Twenty-nine counts charge the use of the mails to defraud (U. S. C. C., Section 215, 18 U. S. C. Section 338) and the thirtieth count, conspiracy so to do (U. S. C. C. Section 37, 18 U. S. C. Section 88) (R. 6-75).

The alleged scheme charged was one to defraud insurance companies by causing various insureds to file with the insurance companies false claims for disability benefits, deceiving the companies into paying money to the insureds in the belief that the claimants were "permanently and totally disabled" by heart disease.

Defendant Elentuch was alleged to be a "chaser" in the employ of Garrow and Garrow, a firm of attorneys, who handled the prosecution of the claims. Defendant Rubin was alleged to be an insured who, with others, manufactured fictitious ailments, underwent fraudulent hospitalization and medicated himself with digitalis in order to affect electrocardiograms (often referred to as "EKGs"), in such a way as to indicate heart disease. Defendants Dr. Goldstein and Dr. Schwartz, with others, were alleged to have

coached claimants as to the history and symptoms of heart disease, and to have made fraudulent certifications and other fraudulent statements.

Ten defendants were named in the indictment. A severance was granted as to two defendants (R. 88). Joseph Garrow pleaded guilty before trial (R. 85). Another defendant pleaded guilty during trial (R. 88). The action proceeded to judgment against the remaining six defendants (R. 91).

The six defendants were convicted by the jury on various counts, with a recommendation of leniency. The four who received jail sentences have appealed. The convictions were affirmed by Circuit Court of Appeals, Second Circuit (fol. 49).

Proceedings Before the Trial.

In 1938 defendant Goldstein, together with one Joseph J. Weiss, and others, were tried for a similar crime. At the trial the Government introduced evidence of intrastate telephone conversations which had been intercepted by means of "wire tapping" carried out under the supervision of federal agents.

The defendants were convicted and their conviction affirmed by the Circuit Court of Appeals. *United States* v. *Weiss*, 103 Fed. (2d) 348 (C. C. A. 2, 1939). This Court reversed the conviction upon the ground that such evidence was inadmissible in view of the provisions of Section 605 of the Federal Communications Act. *Weiss* v. *United States*, 308 U. S. 321 (1940).

On the same day this Court decided *Nardone* v. *United States*, 308 U. S. 338 (1940), in which it held that Section 605 not only rendered the records of intercepted telephone communications inadmissible at the trial, but also forbade the use in advance of trial of such records for the purpose

of obtaining other evidence, or for any purpose whatsoever. This Court outlined the procedure for a preliminary hearing to be held in advance of trial to determine the extent to which the Government's evidence was the "fruit of the poisonous tree".

After the reversal of their conviction in the *Weiss* case, a new indictment was handed down against Weiss, Dr. Goldstein and others, and the case was moved for trial. At the opening of the trial the defendants, pursuant to the rule established by this Court in the *Nardone* case, applied to the Trial Court for the following relief:

(a) To suppress all records and transcripts of intercepted telephone messages.

(b) To suppress all evidence obtained by the Government by the use of such intercepted messages.

(c) To suppress the testimony of those witnesses whose testimony had been obtained in the first instance by the Government by the use of such messages.

(d) To suppress the testimony of those witnesses whose recollections had been refreshed or aided by such messages.

Upon application of the defendants (R. 108-112) a preliminary hearing was held before the District Judge to determine the extent to which the Government had made use of the forbidden "wire tap" evidence. The Court took testimony and rendered a decision. *U. S. v. Weiss*, 34 Fed. Supp. 99 (SDNY 1940). All the defendants in the *Weiss* case, except defendant Goldstein, thereupon pleaded guilty.

The Government did not proceed with the trial of the *Weiss* indictment against defendant Goldstein alone but

abandoned that case and moved the trial of the present indictment, known as the "Garrow indictment", to which defendant Goldstein was also a party. A similar motion and application was made by the defendants and a similar preliminary hearing was held before the same District Judge. By stipulation (R. 114-5) portions of the testimony taken at the *Weiss* preliminary hearing were read into evidence. Certain additional witnesses were also called. The nature of that testimony will be briefly summarized hereinafter.

Facts Developed At the Preliminary Hearing.

(a) *Investigation of the Case Prior to the Arrest of Defendants.*

In August 1936 Nahun A. Bernstein, an attorney, was retained by certain insurance companies to investigate alleged fraudulent disability claims (R. 167). He employed one Kipnis and one Friedman as informers (R. 214, 230). Kipnis had previously admitted orally that he had filed false disability claims (R. 234).

A dictaphone was installed at the place of business of these men, and various persons implicated in the scheme were invited to the premises so that they might be entrapped into admitting their complicity. The conversations of these people at the premises were overheard by means of the dictaphone and were recorded (R. 183-4, 194, 198). These conversations were referred to in the testimony as "room conversations" to distinguish them from telephone conversations.

In addition to eavesdropping on these room conversations by means of dictaphones, telephone communications to and from the premises were also overheard by means of listening over an extension telephone wire (R. 183-4). The telephone conversations so intercepted were also recorded (R. 183.

186-7) and stenographic transcripts were prepared (R. 264).

Mr. Bernstein received the records of both types of conversations and discussed them with the informers (R. 206-13; 214-15).

Finally (R. 280) Kipnis prepared an unsigned written confession of some 52 pages (Govt's Ex. 5). Bernstein then laid before the United States Attorney the evidence which he had collected, consisting of the confession and the records of the intercepted room conversations and telephone conversations. The United States Attorney assigned a postal inspector to continue the investigation (R. 117). After nine days he rendered a report, dated December 6, 1936 (R. 153) which was based primarily upon the material which had been collected by Mr. Bernstein and upon the insurance company files (R. 122-3, 130, 157, 162, 164, 225-6, 278-9, 330-40, 463).

In the meantime representatives of the insurance companies continued to listen to telephone conversations by means of the extensions (Deft's Exs. C, I, J, K, L).

In January 1937 the United States Attorney decided to intercept telephone conversations on a larger scale by use of "taps" applied directly to a telephone wire rather than by eavesdropping over a telephone extension. Consequently, wire taps were placed on the telephones of Dr. Messman, of Garrow & Garrow, and upon both the home and office telephones of Joseph Weiss. By means of these taps Government agents intercepted all telephone messages passing over Dr. Messman's wire between January 29 and April 16, 1937, and again, from [redacted]y 6 through May 20, 1937 (R. 101). These conversations were recorded upon 240 discs or records and 200 stenographic transcripts thereof were prepared (R. 148). Similarly, the Government intercepted all messages passing over the wire of Garrow & Garrow between March 2 and March 5, 1937; from March 8 to April 16, 1937; and

from May 6 to May 20, 1937 (R. 101-2). These messages filled 670 records and 334 transcripts (R. 148). Similarly, the telephone wires of Joseph Weiss were tapped between March 7 and April 16, 1937, and from May 6 to June 30, 1937 (R. 781).

No other investigation was made of the case by the Government until after the arrests (R. 809). Many of the defendants were arrested in May 1937. Appellant Goldstein was arraigned in August 1937.

(b) ***Uses of the Intercepted Communications By the Government.***

Upon the preliminary hearing the witnesses, all of whom were hostile to defendants, attempted to minimize the importance of the "wire-tap" evidence. This position was in marked contrast to that taken by the Government prior to this Court's decision in the *Weiss* and *Nardone* cases. In a press release issued by the United States Attorney at the time of the arrests in May 1937 the Government had stated that "as a result of thousands of records of actual conversations, there is in the possession of the United States Attorney evidence which will lead to the prosecution of many more participants in these frauds" (R. 454-5, Deft's Ex. Y). Similarly, in his summation at the *Weiss* trial, the United States Attorney referred to the "wire-tap" evidence as the "crux" of the Government's case (R. 445-6).

The evidence adduced at the preliminary hearing revealed that the statements of the United States Attorney had been justified. It showed that the records of intercepted communications were used both to induce defendants to turn state's evidence and to refresh their recollection after they had pleaded guilty and agreed to testify for the Government. This was particularly true of Dr. Messman and Elias Gar-

row, the two chief witnesses for the Government at the trial.

The Dr. Messman who testified here is the same Dr. Messman who testified for the Government in the *Weiss* case. In its opinion in that case, this Court took occasion to refer to the circumstances under which Messman became a Government witness as follows (308 U. S. at 325):

> "It appeared at the trial that one of the defendants who pleaded guilty had been confronted with the phonograph records and then decided to plead guilty and become a witness for the Government. Others who had been informed of the Government's possession of the records did likewise."

This Court further stated, with reference to Messman (308 U. S. at 330):

> "Certain of the defendants who were participants in the telephone conversations were informed of the Government's possession of the contents of their communications. Under the stress of this situation they determined to turn state's evidence."

At the preliminary hearing in the case at bar, Messman was examined as to the circumstances under which he had decided to plead guilty. The record shows that upon his arrest in May 1937 he was brought before an Assistant United States Attorney (R. 428-35, 483-93) and that the latter said to him (R. 319) (Govt's Ex. BB for identification):

> "That is exactly what we want. I am telling you before we go any further that there is no use of us kidding each other. We have watched your telephone; we

have watched all these lawyers' telephones; we have had rooms tapped. We know what is going on. We are not stabbing in the dark. *If you want to hear your voice on a record we will be glad to play it.* In your instance, Doctor, there is so much to cover. You have been in this for so many years that we feel that in order for you to help yourself, since you are considered one of the principals here, it would be wise for you to indicate to us whether you intend to tell us everything and come clean, or whether you intend to play ball with the Garrows and the rest of the crowd. We feel that you can be of great value and you want to help yourself. That is straight talk." (Italics supplied.)

The record further shows that following this conversation Messman was put in a cell with other defendants, including one Benjamin Nelson. Nelson told him that he had been brought before the United States Attorney and that they had played a phonograph record of a telephone conversation in which he participated. They had also told him that this record was only a sample (R. 431). Nelson told Messman "They have an awful lot of evidence against us" (R. 431). After this conversation with Nelson, Messman saw the United States Attorney and decided to confess (R. 432, *et seq.*).

The prosecutor, John F. Dailey, who testified in the preliminary hearing, stated that Messman had been advised of the existence of the intercepted messages "either for the purpose of getting him to plead guilty or to get him committed to one set of answers in case he decided to go to trial" (R. 859).

In view of these facts, it is manifest that no reliance can be placed on Messman's statement at the preliminary hearing that his decision to plead guilty was not influenced by his knowledge of the existence of the incriminating tele-

phone conversations in which he had participated (R. 520). This is particularly apparent in view of the further facts that Messman was an admitted habitual and accomplished perjurer (R. 1263, 1265, 1271, 1300, 1301), and that he had been drawing a salary from the Government from the time of his arrest down to the date of his testimony in the case at bar (R. 967, 1278, *et seq.*).

With regard to Garrow, the evidence which appellants were able to adduce at the hearing was somewhat weaker. It did appear, however, that at the time Garrow pleaded guilty and decided to testify for the Government he knew of the existence of the intercepted messages (R. 335). He and his brother sat in the courtroom throughout the first *Weiss* trial where the "wiretaps" were introduced in evidence (R. 3032). It is also significant that his decision to plead guilty was made ten days after the Circuit Court of Appeals had held in the *Weiss* case, 103 F. (2) 348 (the decision later reversed by this Court), that intercepted intrastate telephone communications were admissible (R. 301-3).

Garrow, of course, denied that his decision to plead guilty had been in any way influenced by his knowledge of the fact that the Government possessed records of telephone conversations (R. 408, 418). We believe that the record makes it clear that this denial was not true. In the first place, Garrow's character was admittedly depraved in the extreme, so as to make his word of no value whatever (R. 2703-4, 2713-14, 2730, 2762-3, 2806, 2820, 2825, 3065). In the second place, throughout his testimony at the hearing he fenced with his examiner. He took refuge in the legalistic contention that he had no personal "knowledge" of the existence of the wire taps (R. 417), although he was compelled to admit that he "believed" that they existed (R. 415). The record is replete with convincing indications

that this "belief" was actually thorough knowledge (R. 405-19, 343, 344, 856). There can be no doubt, upon all the facts, that this knowledge played a large part in his decision to turn state's evidence.

In addition to using the records of intercepted conversations for the purpose of breaking down prospective witnesses, the Government used those records to refresh the recollections of the witnesses after they had decided to testify for the Government. The Assistant United States Attorneys were, of course, familiar with the contents of the conversations and had recourse to them in the preparation of the *Weiss* case (R. 351-2). They discussed the contents of the messages frequently with Messman (R. 357). The *Weiss* trial brief (Deft's Ex. H) which Messman prepared for the Government, indicated that throughout the course of his work he had resorted to the records of the wire taps in order to complete the pattern of his testimony (R. 510-13). The records were at all times available at the United States Attorney's office and constituted a storehouse of information for the use of the Government's agents in preparing witnesses (R. 488 *et seq.*; 501).

It is impossible, of course, to measure the exact extent to which Messman's mental operations prior to the trial were affected by the use of the forbidden material. It is impossible to distinguish that portion of the testimony which purported to be independent recollection from that portion which may be attributed to the record of a telephone communication. It would seem undeniable, however, that knowledge of the hundreds of such communications must have materially colored the witness' recollection and that his testimony must have been affected by that knowledge in no small degree.

Decision of the District Court.

At the conclusion of the preliminary hearing the District Court granted defendant's motion for the suppression of testimony only to the extent of suppressing the actual records of intercepted communications themselves (R. 613-15). The trial of the indictment then ensued. Appellant contended that Dr. Messman and Garrow were incompetent to testify upon the ground that (1) they had been induced to plead guilty and testify for the Government as a result of being confronted with the records of their intercepted telephone communications, and (2) their testimony had been strengthened and their recollections refreshed by the use of those records. The question of the competency of these witnesses was raised by appropriate objections and exceptions (R. 962, 2110, 5081-2). The District Court permitted both witnesses to testify.

Decision of the Circuit Court of Appeals.

The Circuit Court of Appeals held that the testimony of Messman and Garrow "was so vital to the case that the convictions cannot survive if the prosecution should not have been permitted to call either" (fol. 38); and further, that the District Court should have forbidden the prosecution to call Messman "and probably Garrow as well, though as to him we need make no finding," on the ground that the Government had failed to satisfy the burden which rested on it of proving that the confrontation of these witnesses with the records of the intercepted messages had no substantial part in influencing them to plead guilty and testify for the Government (fols. 40-41).

The Court affirmed the convictions, however, on the ground that petitioners had no right to complain of this use by the Government of the illegally intercepted telephone commu-

nications because petitioners were not parties to the communications thus used. The Court held that only persons who participate in conversations intercepted and divulged contrary to the provisions of Section 605 of the Communications Act have a standing to complain of the violation of that act.

As an alternative ground for its conclusion, the Circuit Court of Appeals held that the use to which the Government had put the intercepted communications in the case at bar did not violate Section 605. The Court held, despite the provisions of the fourth subdivision of Section 605, and despite the decision of this Court in *Nardone* v. *U. S.*, 308 U. S. 338 (1940), that Section 605 merely forbids a divulgence of an intercepted message upon the trial of the action, and that the statute does not prevent any use by the Government of an intercepted message which has been divulged prior to the trial, at least as against defendants who are not parties to the intercepted message (fol. 45).

Specification of Assigned Errors.

The questions raised were presented by appropriate assignments of error. They were:

1. Dr. Messman and Elias Garrow should not have been permitted to testify (R. 5241-2-4).

2. The appellant was unduly restricted in the preliminary hearing (R. 5237-41).

3. The charge was prejudicial (R. 5244-5).

SUMMARY OF POINTS RELIED UPON.

Point I—It was error to hold that because appellant Goldstein was not a party to the telephone communications intercepted in violation of Section 605 of the Federal Communications Act, he had no standing to complain of that violation.

A. The Court below improperly refused to follow the decision of this Court in *Weiss* v. *U. S.*, 308 U. S. 321 (1939).

B. The Circuit Court of Appeals improperly construed Section 605 as creating a privilege personal to the "Sender".

Point II—It was error to hold that Section 605 of the Federal Communications Act does not prohibit the use upon the trial of evidence obtained by unlawful interception and divulgence of telephone conversations in advance of trial at least as against defendants who were not parties to the communications.

Point III—The Trial Court did not afford the petitioners a fair opportunity to prove that a substantial portion of the Government's evidence was derived from the illegal interception of telephone communications and was not based on independent sources.

A. The prosecution failed to establish independent sources.

B. The Court restricted defendants in the preliminary inquiry.

Point IV—The Court's charge to the jury was prejudicial to the rights of the appellant.

POINT I.

It was error to hold that because appellant Goldstein was not a party to the telephone communications intercepted in violation of Section 605 of the Federal Communications Act, he had no standing to complain of that violation.

A. *The Court Below Improperly Refused to Follow the Decision of This Court in Weiss* v. *U. S.*, 308 U. S. 321 (1939).

The decision of this Court in the *Weiss* case is, in reality, a holding in favor of this appellant upon the question here at issue, although that question was not discussed in the Court's opinion. The record in the *Weiss* case clearly disclosed that Goldstein was neither a party to nor was mentioned in any of the intercepted telephone conversations which had been introduced in evidence. That fact was mentioned by the Circuit Court of Appeals in its opinion in the *Weiss* case (103 F. [2d] 348, 352) and was called to this Court's attention in the Government's brief (Brief of the U. S. No. 42, October Term, 1939, pp. 9, 40-41). It was important enough to be included in the reporter's summary of counsel's argument (308 U. S. at p. 323). This Court nevertheless reversed the conviction of Goldstein, as well as that of the other defendants, and in so doing necessarily held that Goldstein had a right to complain of the admission of the "wire-tap" evidence.

This Court's decision was so construed in a careful note on the *Weiss* case appearing in 53 *Harvard Law Review* 863, (1940) where it was stated (pp. 867-868):

> "The Court's interpretation of Section 605, however, would logically exclude from any proceeding, criminal or civil, evidence obtained by any interception, official or unofficial, of any conversation, *regardless of whether the defendant was a party thereto.*" (Italics supplied.)

In the case at bar the Circuit Court of Appeals recognized that this question was presented by the record in the *Weiss* case. Nevertheless, it held that it was not there decided. We believe that in thus dismissing the *Weiss* case from further consideration the Court below fell into error.

The mere fact that the point was not mentioned in the opinion of this Court in the *Weiss* case does not indicate that it was not considered and passed upon. Nor can it be assumed that this Court reversed Goldstein's conviction, along with that of the others, merely in order to avoid what, in the language of the Court below, would have been an "extremely harsh" result (fol. 41). This Court has not hesitated in the past to affirm the conviction of a defendant who was not prejudiced by the introduction of certain evidence, although at the same time reversing the conviction of other defendants who were prejudiced thereby. *Motes* v. *U. S.*, 178 U. S. 458 (1900).

Moreover, it may be noted that the Court below seems to have felt that an affirmance of Goldstein's conviction in the *Weiss* case would have been harsh, not as to Goldstein, but as to the other defendants, for it "would have presupposed that a fair trial of the defendants could have been had, although the forbidden records were actually introduced in evidence, provided that the jury had been admonished to use them only against Goldstein" (fol. 41). In other words, the Court below apparently believed that defendants against whom such evidence is inadmissible are prejudiced by the admission of that evidence as against another defendant. It is difficult to understand how the Court below, having this point of view, could have laid down the rule which it announced, for that rule will inevitably result in precisely this type of "harshness."

If records of intercepted telephone conversations, or other evidence obtained by their use, are to be admissible against defendants who were not parties to the conversation, de-

fendants who were parties will be as thoroughly prejudiced as though the evidence had been offered directly against them. This result is unavoidable, unless the rule is to be qualified so as to permit the introduction of the evidence against non-parties only in cases in which parties to the conversations are not also on trial. Such a solution would be illogical and impracticable, for the admission of evidence against a particular defendant may not be made to depend upon the identity of his co-defendants.

We believe it to be clear that the question here at issue was necessarily involved in the *Weiss* case, and that the reversal of Goldstein's conviction in that case can be explained only upon the theory that this Court attached no importance to the fact that Goldstein was not a party to the conversations and held that the evidence was as inadmissible against him as it was against the other defendants.

B. *The Circuit Court of Appeals Improperly Construed Section 605 as Creating a Privilege Personal to the "Sender".*

Assuming the question before it to be an open one, the Circuit Court of Appeals based its construction of Section 605 of the Federal Communications Act upon a supposed analogy with the rule that has obtained under the Fourth Amendment, that only the owner of property taken by an illegal search and seizure may object to its introduction into evidence at a criminal trial. This rule as to the Fourth Amendment has been laid down by various Circuit Courts of Appeal, but this Court has never passed upon that question. Much may be said in support of the thesis that the rule is unsound, and that it should be disapproved by this Court. Appellant Schwartz argues that proposition in his brief, and no purpose would be served by repeating that argument here. We believe that whatever may be the proper rule under the Fourth Amendment, the point of importance

is that the rule has no application to the wholly different problem presented by Section 605.[1]

In the first place, that rule is not directly applicable because wire-tapping does not constitute a violation of the Fourth Amendment. This Court so held in *Olmstead* v. *United States*, 277 U. S. 438 (1928), and when in *Weiss* v. *United States*, *supra*, appellants asked this Court to reconsider that decision, it found it unnecessary to do so.[2]

Consequently, the doctrine of the Fourth Amendment cases can be considered here only on the theory that Section 605 is so analogous to the Fourth Amendment that limitations on the latter must be equally deemed limitations on the former. The fallacy of that theory appears both from the contrast in the language of the two provisions and from the difference in their respective purposes.

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1 The decision of the Court below is critically analyzed in 55 *Harvard Law Review* 141 *et seq.* (1941).

It may be noted that the decision of the Court below is in conflict with another decision of the same Circuit Court of Appeals on the same question. In *U. S.* v. *Bernava*, 95 Fed. (2nd) 310 (C. C. A. 2nd 1938), the conviction of a defendant who was not a party to an illegally intercepted telephone communication was reversed. A contrary result was reached in *United States* v. *Seeman*, 115 Fed. (2nd) 371 (C. C. A. 2nd 1940). With the exception of Judge A. N. Hand, the judges who sat in the *Bernava* and *Seeman* cases were different.

2 On the authority of the *Olmstead* case, it has been held that evidence procured by wire-tapping may be introduced, despite an express statute making evidence obtained in violation of the Fourth Amendment inadmissible. *Hitzelberger* v. *State*, 174 Md. 152 (1938).

It may be noted that the opinion of the Court below, in discussing the Fourth Amendment, does not once mention the *Olmstead* case. Yet, in *Nardone* v. *U. S.*, 106 Fed. (2nd) 41 (C. C. A. 2nd 1939), *rev'd* 308 U. S. 338 (1939), in which the Circuit Court of Appeals held that Section 605 does not prohibit the employment of wire tapping as a means of obtaining clues and leads to other evidence, the Court relied on the *Olmstead* decision to distinguish the case at hand from the contrary rule prevailing under the Fourth Amendment. Thus, it would appear that the Circuit Court of Appeals asserts a similarity between Sections 605 and the Fourth Amendment, when to do so would result in a restricted interpretation of Section 605, and denies that similarity when its existence would result in a liberal interpretation of the section.

That Section 605 is broader in its terms than the Fourth Amendment, is apparent at first glance. Thus the Fourth Amendment forbids only "unreasonable" searches and seizures. The Federal Communications Act does not permit "reasonable" wire-tapping. Interception of telephone communications cannot be sanctioned by a warrant. Repeated efforts to restrict this Court's decision in *Nardone* v. *United States*, 302 U. S. 379 (1937), by permitting Government agents to engage in "reasonable" wire-tapping, have failed to receive Congressional approval.[3]

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3 In 1938 a bill was introduced to amend Section 605 so as to provide that "if the head of any executive department or independent establishment * * * reasonably believes that a violation of any criminal law the enforcement of which is under his supervision, may have occurred, may be occurring, or may be about to occur and makes certificate accordingly" this section should not apply to the investigation of such violation, or to the introduction of evidence procured as the result of such investigation (S. 3756, 75th Cong., 3rd Sess.). The bill passed both houses of Congress in slightly different form, but a final text was never agreed upon.

In 1940 the House passed a resolution authorizing and directing the Federal Bureau of Investigation "to conduct investigations to ascertain, prevent and frustrate any interference or attempts or plans to interfere with the national defense." This resolution provided that Section 605 should not apply to such investigation "if the Attorney General finds that there is probable cause to believe" that any violation of law in connection with national defense is taking place, has taken place, or may take place and so certifies. Evidence procured as a result of such investigation might be introduced in a criminal prosecution (H. J. Res. 571, 76th Cong. 3rd Sess.). The Senate, however, did not consider this resolution and it died in committee.

Two bills permitting limited wire-tapping were introduced in the current Congress (H. R. 2266 and H. R. 3099, 77th Cong., 1st Sess.) See: *The Hobbs and Walter Bills Compared*, 29 Georgetown L. J. 889 (1941). Both bills were superseded by a new one providing that notwithstanding the provisions of Section 605 "whenever the Attorney General * * * has reasonable ground for believing that a felony * * * relating to espionage, sabotage * * * the transportation of kidnapped persons * * * or the transmission of * * * extortion communications * * * may have been committed, is being committed, or may be about to be committed" * * * the Federal Bureau of Investigation may "intercept, listen in on, or record telephone, telegraph or radio communications." The evidence thus obtained "shall be admissible and admitted in evidence in any prosecution * * * if such evidence is otherwise admissible." (H. R. 4228, 77th Cong., 1st Sess.)

On June 30, 1941—*28 days after the decision below*—the House defeated this proposal (87 Cong. Rec. 5911).

There is another and more vital distinction between the Fourth Amendment and Section 605. The Amendment does not expressly forbid the *use* of evidence acquired in violation of its provisions. The statute, on the other hand, prohibits not only the acquisition of evidence by interception, but also its subsequent divulgence or use. Congress has said that "no person" shall divulge the contents of the intercepted communication to "any person", or "use the same or any information therein contained for his own benefit or for the benefit of another not entitled thereto." This Court has interpreted this language to mean that the message shall not be divulged either in Court (*Nardone* v. *United States*, 302 U. S. 379 (1937)), or out of Court in advance of trial (*Nardone* v. *United States*, 308 U. S. 338 (1939)), whether the intercepted communication be interstate or intrastate in character (*Weiss* v. *United States*, 308 U. S. 321 (1939)).

There is, therefore, no room to interpret Section 605 as meaning that wire-tapped messages shall not be divulged on some occasions, but may be divulged on others, or that divulgence as against parties to the communication is forbidden, but as against those who are not parties is permitted. The statute creates no such distinction. It prohibits any divulgence or use whatever.

In its brief in opposition to the petition for a writ of certiorari, the Government argued (Br., p. 15) that the Fourth Amendment "as judicially construed" forbids "use", and that hence "there is no reason why a comparable statutory inhibition should require or be given more drastic sanction". This argument exemplifies the same fallacy as is to be found in the opinion below. The "statutory inhibition" of Section 605 in fact is not comparable to that of the Fourth Amendment. Consequently, the judicial construction to be given to the statute must necessarily be different from that which has been given to the Amendment.

Inasmuch as the Amendment does not expressly prohibit use, the lower Federal Courts have construed it as conferring a privilege only upon the owner of the property, which could not be availed of by a third person. Here, however, the broader language of the statute requires a broader interpretation.

Moreover, the interception of telephone communications is factually dissimilar from a search and seizure. In the one case tangible physical property is seized, and the owner either knows about, or can readily discover, its taking, while in the other an intangible conversation is intercepted, and no one is in a position to know if his telephone wires have been "tapped". Under the ruling of the Court below, a defendant is at the mercy of the prosecution to reveal whether or not his rights have been invaded. The likelihood of abuse, either through intention or inadvertence, is apparent. The instant case provides a striking example.

At the preliminary hearing the Government stipulated that 24 of the intercepted communications "have to do with" appellant Goldstein (R. 148). It was further stipulated that the foregoing tabulation included messages in which his name may have been mentioned "or" to which he was a party (R. 610). Appellant Goldstein's *locus standi* to complain of a violation of Section 605 was not raised or discussed in the District Court, and was not even questioned by the Government on the appeal to the Circuit Court of Appeals. Only after the decision of the Circuit Court of Appeals was it, for the first time, discovered that appellant Goldstein had actually been a party to at least eight of the intercepted messages, although that fact nowhere appeared in the Record.

The purpose of Section 605, as this Court has held (*Nardone* v. *United States*, 302 U. S. 379, 383 [1937]) is to prohibit employment by the Government of a particular method of obtaining evidence which is deemed "inconsistent with ethical standards and destructive of personal liberty." That purpose is broader than that of the Fourth Amendment.[4] It can be implemented only by enforcing the statute in accordance with its unequivocal terms. The construction adopted by the Court below, far from enforcing the will of Congress, in fact nullifies it.

If that decision stands, federal prosecutors may continue to "tap" telephone wires, secure in the knowledge that there will certainly be some defendant who will not be a party to an intercepted communication participated in by his co-defendants, and against whom a record of the conversation and all other evidence obtained through its use may be introduced. Indeed, where there are numerous defendants, as is usually the case in indictments of this character, it would be possible to introduce evidence obtained as the result of a conversation between defendants A and B against defendant C and thereafter to use as against defendant B an intercepted communication between defendants A and C, and so forth. Thus, all the wire-tapped messages could be thoroughly divulged to the jury, and yet the legislative prohibition would not be violated.

Such a result would impute to Congress "a self-defeating, if not a disingenuous purpose." *Nardone* v. *United States*, 308 U. S. 338, 341 (1940). Yet it would necessarily follow from the construction given to the statute by the Circuit

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4 We do not believe it is necessary to cite the literature—now very extensive—as to the moral, social and ethical attitude regarding "wire-tapping".

Court of Appeals. That Court recognized that "in form the language [of the statute] is indeed imperative" (fol. 43). We submit that it should have given effect to that imperative language rather than qualify it by reading into the statute a limitation which is not there expressed.

POINT II.

It was error to hold that Section 605 of the Federal Communications Act does not prohibit the use upon the trial of evidence obtained by unlawful interception and divulgence of telephone conversations, in advance of trial at least as against defendants who were not parties to the communications.

As an alternative ground for its conclusion the Court below held that Section 605 does not prohibit the use of intercepted messages prior to the trial. The Court said:

> "It is precisely the use of evidence obtained by such divulgence that *Nardone* v. *U. S.*, *supra*, condemned, but the distinction between divulgence of the messages by the very act of introducing it, and introducing evidence acquired by past divulgence, is nevertheless critical" (fol. 45).

The Court below held that that distinction became important in the case of defendants who were not parties to the communications, and that as against such defendants the intercepted communications might be used prior to the trial to obtain other evidence, whatever the rule might be with respect to admissibility of the communications themselves at the trial.

This conclusion is plainly erroneous, as the Government itself concedes. The Government's brief in opposition to the petition for a writ of certiorari states "It is difficult to reconcile this view with the express terms of the statute prohibiting the use of such information" (p. 16, footnote).

Those "express terms" are contained in the fourth subsection of Section 605 which provides:

> "No person having received such intercepted communication or having become acquainted with the contents * * * thereof shall divulge or publish * * * or *use* the same or any information therein contained for his own benefit or for the benefit of another not entitled thereto." (Italics supplied.)

Obviously, the Court below completely overlooked this provision in holding that Section 605 does not expressly prevent use.

This error not only destroys the alternative ground given by the Court below for its conclusion, but it destroys the first and primary ground as well. For it was upon the supposed absence of any express prohibition against use that the Court relied in drawing its analogy between Section 605 and the Fourth Amendment. The Court recognized that the language of Section 605 was broader and more imperative than that of the Amendment, but it took refuge in the argument that at least as far as "use" was concerned, Section 605 was no more explicit than the Amendment and that, consequently, with respect to use the analogy was accurate. Since, as the Government has now conceded, the premise of this argument is false, it follows that the conclusion is erroneous. Inasmuch as Section 605, unlike the Fourth Amendment, explicitly prohibits use, there is no analogy between

the two provisions and, consequently, no reason whatever for applying to Section 605 the rule of construction which has been adopted by the lower Courts with respect to the Amendment.

POINT III.

The Trial Court did not afford the petitioners a fair opportunity to prove that a substantial portion of the Government's evidence was derived from the illegal interception of telephone communications and was not based on independent sources.

The defendants had contended that the Government's entire case was permeated with wire-tapping from its very inception; that it was impossible at the late date of the preliminary hearing to sift the illegal from the legal strands of evidence.

The Circuit Court of Appeals held that the burden of proof in showing that the evidence did not stem from illegal sources was upon the Government (fol. 40). It declared the alleged restrictions placed upon the defendant in the preliminary hearing were immaterial because: "The prosecution was not shown to have carried the burden of proving how far the taps contributed to Messman's or Garrow's breakdown" (fol. 48).

The Government in its brief in opposition to the petition for certiorari admitted (p. 13) that the Government had the burden of proof but insisted that the Government had established that its proof had an origin independent of wire-tapping. It therefore again becomes material to discuss the sources.

The appellant contends first, that the proof in the lower Court failed to show the existence of any independent source, and second, that if there was evidence of any independent source, the appellant was not afforded a fair op-

portunity to prove that the so-called independent proof was "the fruit of the poisonous tree".

I. *The Prosecution Failed to Establish the Independent Sources.*

The alleged independent sources consisted of:

First: The evidence of Bernstein, with respect to his talks with Kipnis and Friedman, "room conversations" and telephone extension interceptions, examination insurance files and the unsigned confession of Kipnis.

In this connection it may be noted that Assistant United States Attorney Dailey testified Kipnis had been found "unworthy of belief" (R. 719), had made false charges against Mr. Dailey and Mr. Hardy (R. 719). Garrow said of him that he is a man "with a not imposing record" (R. 2818). Upon such a man's alleged confession, recorded after wire-tapping began, the major premise of the Government's independent source was based. Kipnis himself was not produced at the preliminary hearing or the trial. How his services were obtained in the first instance was never revealed.

Second: Inspector Shea's investigation between November 27, 1936 and the date of his report, December 6, 1936, based upon Bernstein's investigation, conversations with Kipnis and Friedman, examination of insurance company files and recorded conversations, both room and telephone extension interceptions. Shea's report was made "without any independent investigation" (fol. 37).

Shea, in testifying about his report, said that he referred therein only to "room conversations" (R. 292 *et seq.* 302). He knew that the telephone calls had been intercepted (R. 123) but confused them with room conversations (R 123, 124, 125).

The instrumentality used he considered "a dictaphone. That is not a telephone tap" (R. 131). He later admitted his error (R. 139).

It is of moment to note that continual difficulties arose in the hearing because of the confusion of Government witnesses in distinguishing between room conversations and telephone interceptions. Government witnesses assumed that the extension recordings were not wire-taps and refused to consider them as such in response to questions. *United States* v. *Polakoff*, 112 F. (2d) 888 (C. C. A. 2d 1940) *cert. denied* 311 U. S. 653, holding that extension wire-taps were illegal, was not decided until after this hearing.

Thus, the witness Bernstein said: "We never engaged in wire-tapping as you put it. If you are speaking of phone conversations taken off extensions, all right" (R. 233), and at another point said: "I don't know of any wire-tapping evidence that existed at that time" (R. 464)—referring to the time when he turned over the evidence to the Government.

Even the Assistant United States Attorney himself first took the position that the extension telephone recordings were not "wire-taps" (R. 203).

Therefore, Shea in preparing his report, considering the telephone extension interceptions as legal, classified all as room conversations (R. 295), but it is perfectly clear that the telephone extension interceptions formed a material part of his "investigation" (Shea's testimony, R. 122-3, 130, 157-8, 162, 164, 288-9; Dailey's testimony, R. 278-9, 291, 338, 621) and was included in the material given to him prior to his report (R. 225-6, 289).

Inspector Shea's report showed that he had reviewed these telephone conversations with other exhibits and recommended prosecution (R. 619).

Attempts were made to bolster the alleged independence of the sources by the testimony of Assistant United States Attorney Dailey. No matter how analyzed, the sources were the same—Shea's report, and ultimately, Bernstein's preparation which included illegal interceptions.

Dailey testified that, included in the evidence given to the Government was the illegal telephone extension interceptions (R. 621). Although the Government took the position it would not use such taps, Mr. Dailey read from the unsigned confession of Harry Kipnis (R. 623, Government's Exhibit 5). This Exhibit purports to involve Dr. Goldstein through conversations between Dr. Messman and Kipnis (R. 629, 650-55). Mr. Dailey read into the record, from this Exhibit, portions of Mr. Kipnis' daily report for September 14, 1936, which incorporated the same material as was contained in a telephone extension interception of September 14, 1936. In reading it, he omitted the telephone interception (R. 638-9). Similarly, when Dailey read a daily report of Kipnis (Deft's Ex. 11), it originally had a telephone interception attached, but Mr. Dailey read only the accompanying report (R. 664).

The legal and illegal strands of evidence were so thoroughly interwoven that a witness could no longer separate one from the other no matter how honest his endeavor.

Thus, in effect, the United States Attorney read into the record only such portions as indicated no wire-tapping, although telephone extension interceptions had simultaneously taken place. Where the leads and clues started and where they ended was impossible to ascertain.

As to the actual wire-taps themselves and the prior use made thereof, the Government disclaimed that any use whatsoever had been made of them for the purpose of preparing for trial. The Government contended that after the wire-taps had been accumulated in the *Garrow* case, nothing was

done with the taps because the prosecution was preoccupied with the *Weiss* case.

It is undisputed that Messman had heard the wire-taps obtained in the *Weiss* case which undoubtedly included phone calls he had made to both Weiss and Garrow, because he was a defendant and co-conspirator in both cases. Messman's Trial Brief contained evidence and testimony which he was going to reveal in both cases.

That the Government's contention is hardly plausible is made clear by a consideration of many master facts including the fact that some of the conspirators involved with the Garrows had been involved with Weiss, where there had been a clear use of wire-tapping; that Messman did see some of the wire-taps (R. 386); that some of the taps had been used by the Grand Jury in presenting the earlier indictment against Garrow (R. 368); that wire-tapping appeared to be legal at that time because the Circuit Court of Appeals had already affirmed the Weiss conviction, and the Government was preparing the *Garrow* case for trial (R. 355 *et seq.*); and that Weiss and Garrow had been named together in one indictment (R. 388), which was not prosecuted.

Despite all this, the Government insisted that in the *Garrow* case the information obtained by wire-tapping at the cost of thousands of dollars and with records and transcripts available, was completely disregarded and not used in any manner (R. 336).

2. *The Court Restricted the Defendants in the Preliminary Hearing.*

The defendants were not afforded a full and free opportunity to eliminate all possible doubt as to the existence of independent sources. We recognize that there must be limits placed upon the defendants' rights to pry into the

Government's case, but as Judge Learned Hand said in *United States* v. *Nardone*, 106 F. (2d) 41 (C. C. A. 2d 1939) at p. 44:

> "One thing leads to another and if the original taint pervades the last scrap of evidence eventually found, the accused will not get his rights short of a complete disclosure."

First: Appellant sought to cross-examine on the matter of leads and clues. From the very inception, the Court took the position that cross examination was not to be allowed (R. 126, 153, 175, 180, 348) even to refresh hostile witnesses' recollections because the Court did not consider the proceeding a trial (R. 153).

Second: The appellant contends that the Court erred in not permitting the defendants to see many documents. It became evident early in the hearing that the Court would not admit documents in evidence (R. 323-36, 333, 340, 370, 373); that defendants could inspect them only if they mentioned wire-taps in *haec verba* or if the Government consented to such inspection (Cf. R. 131-2, 136, 137-8, 150, 291, 309, 340). The Court itself examined exhibits for the purpose of determining whether or not wire-tapping appeared therein (Prel. Hrg. Exhibits—Shea's Report, not marked [R. 292-3], Deft's Exs. BB [R. 323], DD [R. 340], EE [R. 370], 1, 5 and 6).

An indication of the difficulties arising from such procedure is found in the Court's reading of Shea's report. The Court directed Shea's attention to certain paragraphs (R. 292, *et seq.*) which the witness stated were "room conversations". The Court after reading the report said it found no reference to telephone taps (R. 293). Then Mr. Dailey asked

Shea to reconsider a particular paragraph (R. 294). Shea finally admitted it referred to a wire-tap. The District Court in the *Weiss* opinion made no reference whatever to the telephone interceptions and discussed only the room conversations. Shea was not sure at the date of the hearing whether they might have been telephone extension interceptions (R. 302-3). If the Government found it difficult to disassociate wire-taps from the room conversations, an impossible task was imposed upon the defendants, without appropriate liberality in inquiry.

It is not claimed that the Judge improperly read the material but it is contended that in view of the Judge's unfamiliarity with the ramifications of the case, his reading could be of little assistance in determining whether any particular evidence had been obtained from a tainted source.

As long as the documents contained no express reference to wire-tapping the Judge was apparently satisfied. The defendants should have had an opportunity to see the so-called independent sources and to examine the particular evidence and trace its source. Without such privilege wires may be tapped indiscriminately and thereafter a report prepared embodying the facts learned but without reference to wire-tapping. Under the Court's ruling this would foreclose any further inquiry by the defendants.

Third: Witnesses were permitted to express opinions and conclusions over objection and attempts to find the basis for the statement or opinion were prevented by the Court.

When Bernstein was asked what information he had about the defendants prior to their arrest, the Court refused to strike Bernstein's answer when he said: "We had information concerning all of the defendants from sources having nothing to do with any telephone conversations" (R. 256). An attempt to limit Bernstein to stating evidence in his

possession rather than his conclusions, was prevented by the Court (R. 257).

Mr. Shea was permitted to testify: "I knew we had a complete mail fraud case and I went on other work" (R. 280). The Court refused to strike this and then refused various efforts on the part of the defendants to ascertain whether in that report Shea had named each individual defendant on trial (R. 301). The Court refused to permit an inquiry as to whether in the witness' opinion he had all of the testimony or evidence that was needed against the defendants (R. 306). The Court refused to permit the defendants to see the December 6, 1936 report of Shea (R. 307), which was claimed by the defendants to be based on wire-taps but which the Government contended was derived from an independent source. The importance of Mr. Shea's expression of opinion, without benefit of cross examination was indicated when the Court commented and said (R. 308):

> "It appears that Inspector Shea has been a post office inspector for twenty years. In that time he has given a great deal of attention to mail fraud cases. His opinion on the subject is very valuable, much more valuable naturally than would be the opinion of a person lacking that experience."

An attempt to probe into this was denied (R. 308). Mr. Shea's opinion, the Court said, in its decision, "is quite convincing". See *Weiss* v. *U. S.*, 34 Fed. Supp. 99, at 101 (S. D. N. Y. 1940).

Mr. Dailey, too, was permitted to state opinions freely (R. 626, 675, 753 *et seq.*, 757-60, 253). The defendants were not permitted to see the basis for Mr. Dailey's statements (R. 630-1). This included Exhibit 5, the confession of Harry Kippis from which the witness read (R. 623) and

the case histories which were furnished by Kipnis (Govt's Ex. 6).

No request was made to examine Government's Exhibit 5. This Exhibit appeared in the testimony incorporated by stipulation from the *Weiss* hearing (R. 424). We submit that from the Court's previously indicated attitude a request to examine the document would have been futile. The result was that Mr. Dailey's testimony had to be taken as given, leaving the defendants with no alternative but to receive the words of the hostile witnesses from the witness stand without an opportunity to see the supporting data.

The original wrong was in the tapping of the wires. No matter how difficult or burdensome it might have been to the prosecution, the original responsibility rested with it. The burden was one of its own creation. The defendants, therefore, should have had a full and ample opportunity to probe into the origin of the testimony alleged to be untainted.

POINT IV.

The Court's charge to the jury was prejudicial to the rights of the appellant.

The Court prefaced his charge with the conventional instructions given to a jury in a criminal case. The bulk of the charge, however, consisted of comments upon the evidence. We believe it fair to say that the charge, in substance, amounted to a summation for the Government.

The Court did not review the entire evidence. He summarized those items of evidence most damaging to the appellant, without referring to appellant's explanation of that evidence or to the testimony of other witnesses which served to corroborate the testimony of appellant. The very items chosen by the Court for comment served to emphasize the importance of those items in the minds of the jury.

The comment was phrased, for the most part, in the form of rhetorical questions, which were so worded as to admit of only one answer, an answer which was invariably injurious to the appellant. A few examples will illustrate the Court's method.

At the outset of his charge, the Court referred at length to the witnesses Messman and Garrow, one a confessed perjurer and the other the confessed instigator of the fraudulent scheme. The Court elaborated upon their "low moral character" (fol. 12) and referred to them as "crooks" (fol. 13). He then pointed out that the appellant had dealt with Messman and Garrow over a period of three years, during the course of which time they had brought various patients to the appellant in his capacity as consultant (fols. 24-25). The Court then remarked (fol. 25):

> "I suggest that you turn your minds back to Messman and Garrow as you observed them. I think that together they were on the witness stand a matter of about three weeks. I think you had an ample opportunity for appraising them. What do you say as to the impression that they would be likely to create on consultants? Would consultants be able to observe, during a period of dealing with those men, what their essential qualities were? Is it likely that the defendants Goldstein and Schwartz were sufficiently equipped with the powers of perception to fairly well appraise Garrow and Messman?"

In making this observation the Court said nothing whatever about the fact that the appellant had denied any knowledge of the true characters of Garrow and Messman. He failed entirely to point out that the appellant, if his testimony were true, would obviously have had no opportunity

to appraise Garrow and Messman in the same light and under the same circumstances as were presented to the jury. He did not caution the jury to weigh the testimony of Garrow and Messman in the light of their character and background, as against the testimony of the appellant, in the light of his admittedly good reputation. He had limited his caution to a formal statement that care should be exercised in examining their testimony (fol. 13). In effect the Court suggested to the jury that they should find the appellant guilty merely because he had done business with persons who, years after the event, admitted their guilt upon the witness stand (fols. 25-26).

Another illustration is still more striking. This appellant had treated one Fradkin, who was not claimed to have been a fraudulent case. It was charged by the Government, however, that the appellant had falsely certified as to the date of his treatment of Fradkin. In his charge the Court dwelt at length upon Fradkin's testimony in this connection and stated specifically that it was "worthy of your attention" (fol. 29). After summarizing Fradkin's testimony, he remarked (fol. 31):

> "Now you will recall that it is in the Fradkin case that Goldstein's office records are missing. Does that tell you anything about knowledge on the part of the defendant Goldstein of a scheme in which Garrow and Messman concededly were engaged?"

The Court wholly failed to advert to the appellant's version of this incident. He failed to mention his denial that he had predated his records in the Fradkin case (R. 4000). With respect to the missing records, the Court failed to point out that the Government actually possessed and had put in evidence as Exhibit 216 a copy of the appellant's

office record in that case (R. 4000). He failed to point out that Fradkin himself had not testified definitely as to the date of his visit to the appellant, that he had been unable to state whether his first heart attack was in 1935 or 1936 because his "memory for the exact year would be difficult" (R. 3207), and that he had testified that his memory for dates was unreliable (R. 3207).

Most important of all, the Court failed to mention that the only direct testimony as to an alleged predating in this case came not from Fradkin but from Garrow, and that Garrow had testified that he had asked the appellant to predate the record during a conversation in October 1937, at which the appellant's secretary, Miss Lanzetta was present (R. 3111-12). He failed to mention that Garrow had sworn positively that he would "stake everything" on the fact that Miss Lanzetta was there (R. 3112-13). He omitted to point out that Miss Lanzetta corroborated the appellant's denial (R. 4256) and that it had been demonstrated by documentary records that Miss Lanzetta was not in fact employed by the appellant at the time and that because of illness she had been away from appellant's office for many months prior and subsequent to the date of the alleged conversation (R. 4256, 4286-87) and hence could not possibly have been present.

Another illustration is to be found in the Court's remarks (fols. 32-33) with respect to a certain letter (Deft's Ex. 232) written by appellant to defendant Rubin, in which appellant requested Rubin to call at appellant's office. The request was made by letter for the reason that Rubin had no telephone (R. 4355).

It was the Government's contention that the purpose of the appointment was to enable appellant improperly to administer digitalis to Rubin. It was appellant's contention that the purpose was merely to discuss with Rubin

whether he wished to consult another physician, one Dr. Wyckoff, and if so whether Rubin would be able to pay Dr. Wyckoff's fee (R. 4177, 4207, 4359).

The Court stated in his charge:

> "You might look at that letter for what it may or may not teach you. Do you see anything in that letter on the subject of a consultation with Dr. Wyckoff? You may ask yourselves whether had that been the object of the letter, wouldn't it have been perfectly simple to notify Rubin that an appointment with Dr. Wyckoff had been made at a certain date, and to say: if this is not agreeable, let me know? You may wish to ask yourselves whether it was necessary to have Rubin come to Goldstein's office in order to confer with him on his ability to raise money to pay Wyckoff, in view of Goldstein's testimony that in a great many, if not all, the cases Garrow paid the fees" (fol. 32).

In posing these questions to the jury the Court failed to point out that appellant had denied that he had administered digitalis to Rubin (R. 4207); and that Rubin also had denied it (R. 4353). The Court failed to mention the testimony to the effect that Rubin had discussed with appellant the possibility of obtaining an opinion from Dr. Wyckoff and that prior efforts to consult Dr. Wyckoff had been unsuccessful because of the latter's absence in Europe (R. 4360). In omitting reference to this testimony and in placing the entire emphasis upon the fact that this letter made no reference to Dr. Wyckoff, the Court gave the letter an importance wholly unjustified in the light of all the evidence.

Another illustration of the Court's method is found in its comments with respect to the question of whether or not

it was generally known in the medical profession that digitalis could affect an electrocardiogram (fol. 33). Appellant had testified that prior to the time of the indictments in this case there was controversy on that subject and that little was known about it (R. 4129-33). With the obvious purpose of contradicting this testimony the Court pointed to the fact that a printed hospital form contained a question, among others, as to whether the patient had received digitalis (R. 5153). In emphasizing this fact the Court failed to point out that there was nothing about this particular question that would indicate that digitalis could possibly have any bearing on the electrocardiogram and it was but one of many questions on the back of the form (R. 4135, *et seq.*).

The Court below held that this charge did not constitute prejudicial error, on the ground that the District Court gave the jury only oblique intimations as to his views of the appellant's guilt (fol. 46). The Court below also stated that in its experience, "juries are generally quite robust enough to form their own opinions" independently of any opinions expressed by the Court (fol. 47).

We believe that this observation is significant as indicating the frame of mind with which the Court below considered the charge. That point of view is in marked contrast to that of this Court in *Starr* v. *United States*, 153 U. S. 614 (1893), where it is stated, at page 626:

> "It is obvious that under any system of jury trials, the influence of the Trial Judge on the jury is necessarily and properly of great weight and that his lightest word or intimation is received with deference and may prove controlling. *Hicks* v. *United States*, 150 U. S. 442, 452."

It is true, of course, that the Court may comment upon the evidence. *Lovejoy* v. *United States*, 128 U. S. 171 (1888).

It is equally axiomatic, however, that in thus commenting the Court must not prejudice the defendant by a one-sided presentation of the facts.

> *Quercia* v. *U. S.*, 289 U. S. 466, 470 (1933);
> *Stokes* v. *U. S.*, 264 Fed. 18, 25 (C. C. A. 8th, 1920);
> *Weare* v. *U. S.*, 1 Fed. (2d) 617, 619 (C. C. A. 8th 1924).

As was said in the *Weare* case, *supra* (R. 619):

> "* * * it is not a fair jury trial when the Court turns from legitimate instructions as to the law to argue the facts in favor of the prosecution."

Curiously enough, the Court below cites, as prior precedent for this type of charge, *Dillon* v. *United States*, 279 Fed. 639 (C. C. A. 2d, 1921), although recognizing that it was probably overruled in *United States* v. *Murdock*, 290 U. S. 389 (1933).

He also cites *United States* v. *Bob*, 106 Fed. (2d) 37 (C. C. A. 2d, 1939), *cert den.* 308 U. S. 589 (1940). In that case, however, the Court said, referring to the charge:

> "It did present also the defendant's claims, which consisted, in the main, of denials, though it indicated its own opinion of the nature of these denials."

We believe it clear that the charge in the case at bar was essentially one-sided, not only in what the Court said, but in what he left unsaid, and that the jury was given to believe that the Court was convinced of the appellant's guilt and that the Court disbelieved the appellant's explanation of the testimony against him. The intimations of guilt, however "oblique" were as effective as if they had been phrased

in direct and unequivocal language. As far as the jury was concerned, the Court might as well have directed a verdict of guilty. We believe that the Judge went far beyond the limitation to which a Judge should be permitted to go in "assisting" a jury to determine decisions entrusted to it by the Constitution. Upon this ground alone, apart from all other questions in this case, the judgment appealed from should be reversed.

CONCLUSION.

Wherefore, the appellant Goldstein prays that the judgment of conviction below be reversed and the indictment dismissed.

Respectfully submitted,

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

No. 256

DR. MAXIMILIAN GOLDSTEIN, DR. BENJAMIN SCHWARTZ, HERMAN RUBIN AND IRVING ELENTUCH,

Petitioners,

vs.

THE UNITED STATES OF AMERICA.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF ON BEHALF OF PETITIONER, BENJAMIN SCHWARTZ.

LESTER R. BACHNER,
Counsel for Petitioner
Benjamin Schwartz.

OSMOND K. FRAENKEL,

INDEX.

	Page
Opinions below	1
Jurisdiction	1
Statement of the case	2
Errors intended to be urged	7
Summary of points relied upon	8
Point I. Petitioners are in a position to object to evidence obtained as the result of illegal wire-tapping	8
Point II. The District Court unduly restricted the scope and conduct of the preliminary hearing	20
Point III. The trial court's charge was unfair	22
Conclusion	29

TABLE OF CASES CITED.

Agnello v. *United States*, 269 U. S. 20	13
Boyd v. *United States*, 116 U. S. 616	14
Burdeau v. *McDowell*, 256 U. S. 465	16
Byars v. *United States*, 273 U. S. 28	15
Brown v. *Mississippi*, 297 U. S. 278	19
Chambers v. *Florida*, 309 U. S. 227	19
Connolly v. *Medalie*, 58 F. (2d) 629	11
Flagg v. *United States*, 233 Fed. 481	11
Gambino v. *United States*, 275 U. S. 310	15, 16
Gouled v. *United States*, 255 U. S. 298	14
Hale v. *Henkel*, 201 U. S. 43	16
Johnson v. *United States*, 270 Fed. 168	27
Linn v. *United States*, 251 Fed. 476	11
Minner v. *United States*, 57 F. (2d) 506	27
Moy Wing Sun v. *Prentis*, 234 Fed. 24	11
Nardone v. *United States*, 302 U. S. 379	15
Nardone v. *United States*, 308 U. S. 338	3, 4, 6, 8

	Page
O'Shaughnessy v. *United States*, 17 F. (2d) 225	27
Palno v. *United States*, 58 F. (2d) 111	27
Quercia v. *United States*, 289 U. S. 466	22
Rosenwasser Brothers, In re, 254 Fed. 171	11
Silverthorne Lumber Co. v. *United States*, 251 U. S. 385	14
Tsuie Shee v. *Backus*, 243 Fed. 551	11
United States v. *Bernava*, 95 F. (2d) 310	8
United States v. *Murdock*, 290 U. S. 389	22, 27
United States v. *Polakoff*, 112 F. (2d) 888	18
United States v. *Seeman*, 115 F. (2d) 371	8
United States v. *Silverthorne*, 265 Fed. 853	12
Weare v. *United States*, 1 F. (2d) 617	27
Weeks v. *United States*, 232 U. S. 383	14
Weiss v. *United States*, 308 U. S. 321	2, 3, 4, 8, 9, 13, 18

STATUTES CITED.

Communications Act, 47 U. S. C. 605	31
Judicial Code, Sec. 240(a)	1

OTHER AUTHORITIES CITED.

34 Harv., L. R. 361-367	14
Hearings, 77th Congress	29n
Wigmore, Section 2184, Vol. VIII, p. 31, ff	16n
Wigmore, Section 2196, 3rd Ed., Vol. VIII, pp. 102, 104	16n
Wigmore, Section 2251, p. 318	16n

APPENDIX.

Communications Act, 47 U. S. C. 605	31

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

No. 256

DR. MAXIMILIAN GOLDSTEIN, DR. BENJAMIN SCHWARTZ, HERMAN RUBIN AND IRVING ELENTUCH,

Petitioners,

vs.

THE UNITED STATES OF AMERICA.

BRIEF ON BEHALF OF PETITIONER, BENJAMIN SCHWARTZ.

Opinions Below.

The opinion of the Circuit Court of Appeals for the Second Circuit is reported at 120 F. (2d) 485. No opinion was rendered in the District Court.

Jurisdiction.

The jurisdiction of this Court is invoked under § 240-a of the United States Judicial Code. The judgment of the Circuit Court of Appeals was entered on June 18, 1941, and the petition for a writ of certiorari was filed on July 11, 1941.

Statement of the Case.

This is a continuation of the same prosecution (though under a different indictment) as that which was before this Court in *Weiss* v. *United States*, 308 U. S. 321. Petitioner, Goldstein, in this case was one of the defendants in the *Weiss* case. In the course of that trial the Government introduced evidence obtained by wiretapping. Although the wiretapping in that case did not involve the defendant, Goldstein, his conviction, as well as that of the other defendants, was reversed.

Subsequently, an application was made by the defendants for a preliminary hearing for the purpose of suppressing evidence obtained as the result of wiretapping. Judge Byers, before whom that hearing was held, ruled (34 F. Supp. 99) that the Government might not use any records or transcripts of intercepted telephone messages and that all evidence obtained as the result of the use of these messages be likewise suppressed. The court refused to rule that the Government could not call certain witnesses who had confessed, it being the contention of the defendants that these confessions were induced by the wiretapping.

The *Weiss* case was subsequently abandoned upon the defendants in that case, with the exception of Goldstein, having pleaded guilty. The indictment in the case at bar was then brought on to trial. Except for Goldstein, none of the defendants in the case at bar were involved in the *Weiss* case.

As this Court will remember, the charge in these cases is the use of the mails pursuant to a scheme to defraud insurance companies by inducing them to pay false claims for disability, health and accident benefits. Some of the defendants indicted were claimants, some lawyers, some, like Goldstein and Schwartz, were doctors, and others were

individuals who, it is charged, obtained the business which was handled by the doctors and lawyers.

1. Prior to the trial of the case at bar, defendants made an application similar to that which had been made in the *Weiss* case (R. 103-112).[1] At the hearing held before the same Judge, part of the testimony taken in the *Weiss* case was placed in evidence (R. 114, 115). Additional witnesses were likewise called. It was admitted by the Government that there had been wiretapping. While the record indicates that some of the wiretapping involved certain of the defendants in the case at bar (R. 148) it is not clear from the record whether there was any wiretapping of the wires of any of these defendants (see R. 610). This phase of the case was not developed at the preliminary hearing, or at the trial, because on neither occasion was any question raised with regard to the right of the defendants to complain of the illegal wiretapping. That, however, has become the chief issue here because the Circuit Court of Appeals disregarded the theory upon which the case was tried and rested its affirmance mainly on this point.

The preliminary hearing concerned itself with two matters, the extent of the evidence which the Government had which was free from any taint of wiretapping; the right of the Government to use the witnesses, Messman and Garrow who, it was claimed by the defendants, had been induced to plead guilty and testify as the result of their confrontation with the records of the illegally intercepted telephone communications. Judge Byers ruled at the preliminary hearing in this case, as he had done in the *Weiss* case, that there was substantial evidence free from taint which the Government should be permitted to offer at the trial. He ruled, both at the preliminary hearing (R. 614) and at the trial, (R. 962, 2110) that Messman and Garrow were not

[1] The references in roman type are to the typewritten record; those in italics to the printed record.

disqualified from testifying, on the ground that, as he had stated in the *Weiss* case (34 F. Supp. 101, 102), the decision of the witnesses to testify was based on self-interest rather than contamination by wiretapping. It had not been disputed in the Trial Court that if defendant's contentions as to the facts were correct, then the testimony of these witnesses would be the "fruit of the poisonous tree" of the Government's illegality, and barred under this Court's decision in the second *Nardone* case, 308 U. S. 338. The Circuit Court of Appeals, however, reached the conclusion that Messman at least, was induced to testify in consequence of illegal wiretapping (*R. 22*,[2] 120 F. [2nd] 488).

We shall not at this time discuss the facts upon which we base our contention that Messman was disqualified from testifying, since our view has been accepted below, but shall merely call to this Court's attention its own description of Messman's testimony in the *Weiss* case (308 U. S. at 330):

> "It is said, however, that when some of the defendants pleaded guilty, elected to take the stand and to testify to the contents of the messages, they gave the authorization contemplated by the statute. We have already adverted to the method by which this supposed authorization was obtained. Certain of the defendants who were participants in the telephone conversations were informed of the Government's possession of the contents of their communications. Under the stress of this situation they determined to turn state's evidence. Messman's license to practice medicine has not been revoked; he was not required to plead to the indictment; he was paid a salary by the Government, first of $65.00 per week and later of $100.00 per week, amounting, in the total, to $3,237.12."

The Circuit Court of Appeals, despite its ruling that this testimony was tainted and was vital to the prosecution,

[2] The references in italics are to the printed record.

affirmed the convictions on the ground that defendants in the case at bar had no standing to raise the issue of taint because they had not been parties to conversations over tapped wires.

2. The rulings of the District Court with respect to the conduct and scope of the preliminary hearing unduly hampered petitioners' efforts to develop proof in support of their contention that the Government's evidence had been obtained, directly or indirectly, as a result of the use of illegally intercepted telephone messages. An attempt to limit witnesses to stating evidence rather than their own conclusions was prevented by the Court. (R. 257, 280). The unrestrained expression of witnesses' opinion was permitted. (R. 256, 301, 307, 308, 626, 675, 753 et seq. 757-60).

The Court refused to permit petitioners to inspect numerous documents to ascertain how thoroughly interwoven illegal strands of evidence were with legal strands of evidence (Prelim. Hearing Exhibits Shea's Report, not marked (R. 292-3) and Exhibits BB (R. 323), DD (R. 371), DD (R. 373). The court examined these documents but would not permit petitioners to see them. The full import of the material which they contained could only be determined by petitioners, particularly since independent reading by a Judge unfamiliar with the ramifications of the case could be of no assistance in determining whether any particular evidence had been derived from the tainted source. Only where wiretapping was expressly mentioned or where the Government gave its consent were petitioners permitted to examine even portions of documents. (See R. 131-2, 136, 137-8, cf. 150, 293, 307, 340).

This was particularly prejudicial in view of the fact that petitioners were trying to show that wiretapping had entered into the preparation of the case even prior to the time it had been brought to the United States Attorney's office, after which time wiretapping was admittedly con-

ducted with the Government's knowledge and assistance.

The insurance companies had obtained an informer named Kipnis, who is alleged to have given a story which obviously "would not be believed unless thoroughly corroborated" (*R. 21;* 120 F. (2d) at 487).

Wiretaps were used by the insurance companies to obtain that corroboration. After the matter was brought to the United States Attorney's office, wiretapping was employed under the Government's supervision, taps being placed on the offices of Garrow, Dr. Messman and the home and office of Joseph J. Weiss (R. 101-102, 148, 781).

Petitioners contended that the taps, in addition to being used to break down Messman and Garrow, had served the purpose of furnishing clues and leads to refresh the recollection of these witnesses and others and to obtain additional information. In fact, it was claimed that the illegal taint attached to every bit of the Government's evidence.

The Circuit Court of Appeals held (*R. 30;* 120 F. (2d) at 492), that despite the fact that the District Judge "did indeed express himself once or twice in a way that seemed to restrict the examination unduly" nevertheless he did not so conduct the hearings as to violate the general principles announced by this Court in *Nardone* v. *United States*, 308 U. S. 338. Moreover, the Court held that any question as to the conduct of the hearing was immaterial, in view of the fact that the petitioners had no standing to complain of the use to which the intercepted messages were put.

3. The trial was long. The chief testimony against petitioners was, as recognized in the Court of Appeals, the testimony of Messman and Garrow, confessed wrongdoers. The chief issue was whether or not the particular defendants accused actually participated in the illegal conspiracy of which Messman and Garrow were the leading spirits. The defendants took the stand in their own behalf. Sharp issues

of fact were thus created. That the Government's case against petitioner, Schwartz, was weaker than that against the other defendants may be inferred from the fact that after the jury was out a long time it asked for a reading of some of the testimony dealing with Schwartz (R. 5180 and following).

In such a situation it behooved the trial court to present the issues as fairly as possible to the jury, to submit to the jury the conflicting contentions of both sides and guide it to a just result, having in mind both the rights of the defendants and those of the United States. It is submitted that particularly with regard to petitioner, Schwartz, the Judge failed in his performance of this obligation. Nowhere will there be found any statement of the evidence in support of the defense, or even any clear statement of the contentions of the defense. The portion of the charge relating to petitioner Schwartz consists almost entirely of a series of hypothetical questions, so framed as to indicate only one possible answer, and that an answer unfavorable to this petitioner. As was said by the Circuit Court of Appeals (*R. 29*, 120 F. (2d) at 491):

> "These he did indeed couch in such a way as to make fairly apparent what answers he would himself have given to them; and it must be owned that the answers were damaging."

The particular portions of the charge relating to this petitioner will be more fully discussed hereafter. The Circuit Court of Appeals in sustaining the charge said that the intimations of the Judge were "oblique" only and stated that in other parts of the charge he had cautioned the jury not to take his opinion as authoritative.

Errors Intended To Be Urged.

The assignments of error relied upon by petitioner, Schwartz, are the following:

Nos. 1-7 (R. 5219-5221) dealing with the preliminary hearing; No. 9 (R. 5221) dealing with the testimony of Messman and Garrow at the trial and Nos. 12-14 (R. 5222, 5223) dealing with the charge.

Summary of Points Relied Upon:

POINT I.

PETITIONERS ARE IN A POSITION TO OBJECT TO EVIDENCE OBTAINED AS THE RESULT OF ILLEGAL WIRETAPPING.

POINT II.

THE DISTRICT COURT UNDULY RESTRICTED THE SCOPE AND CONDUCT OF THE PRELIMINARY HEARING.

POINT III.

THE TRIAL COURT'S CHARGE WAS UNFAIR.

POINT I.

Petitioners Are in a Position to Object to Evidence Obtained as the Result of Illegal Wire-Tapping.

We believe this basic point to have been decided, though not discussed, by this Court in the *Weiss* case (308 U. S. 321). For in that case this Court reversed the conviction of one of the defendants, Goldstein, although his wires had never been tapped and the prosecution, in its brief, contended that Goldstein's conviction should, therefore, be affirmed. A like conclusion had been arrived at, also without discussion, by the Circuit Court of Appeals for the Second Circuit in *United States* v. *Bernava*, 95 F. (2d) 310.[3]

[3] In *United States* v. *Seeman*, 115 F. (2d) 371, the same Court later reached a contrary conclusion, but primarily on the ground that none of the conversations involved the particular defendant appealing.

In the case at bar the Circuit Court of Appeals took the view that in the *Weiss* case this Court had "disregarded" the point involved. It is somewhat difficult to understand the reasons given by the Circuit Court for reaching that conclusion. At one point it is suggested that it would have been too difficult to conduct a trial at which the conversations might have been introduced in evidence against Goldstein alone; immediately afterward it is suggested that if the trial had been fairly conducted, the conversations would not have been received in evidence at all. We do not believe that any such fine spun theories can account for this Court's decision. On the contrary, it seems apparent that this Court, on broad principles of justice, decided that whenever evidence has been admitted against all of the defendants and it was illegally received as to some, all of the defendants might take advantage of that error. While that ruling may not reach as far as the circumstances of the instant case, it clearly disposes of the general contention of the government that no one can complain of the illegality of the evidence except persons who were parties to the conversations. And in a case like the present where the persons whose wires were tapped were not made defendants, but the tapping was the source of the evidence used to convict, the same result should follow.

It is clear that there is nothing in the Communications Act (47 U. S. C. 605) which justifies any use of wire taps merely because the use is in connection with individuals whose conversations were not overheard. The prohibition of the statute is complete. The only exception is where the interception itself was consented to, thus not illegal. We shall deal with that phase of the case more in detail hereafter.

The Circuit Court of Appeals (120 F. (2d) at 489) based its decision adverse to petitioners on two grounds: It held first, that only a person whose conversations were tapped

could object to such tapping, and second, that even if this were not so, and other persons might object to the introduction of the wire taps themselves, they could not object to evidence which was merely obtained as the result of the use of such taps. This last position is based upon so obvious a misreading of the applicable statute (47 U. S. C. 605) that the government in its brief on the application for certiorari in effect conceded that the Circuit Court of Appeals had been in error in sustaining the decision on that point (Brief p. 16, footnote 9). We shall deal no further with that aspect of the case unless the government's brief requires some reference to it in a reply brief.

On the basic issue, whether one whose conversations had not been tapped, could object to testimony based on the wire taps or obtained from them, the decision of the Circuit Court of Appeals falls into several parts. That court assumed that the decision under the Communications Act on such a subject should be the same as would be a decision under the Fourth and Fifth Amendments and that under the Fourth Amendment a defendant could not object to the receipt in evidence of matter unconstitutionally seized from someone else, and under the Fifth Amendment that the privilege was wholly personal. The Circuit Court relied also on the fact that the statute referred to the sender's consent. In so doing the court disregarded the theory upon which the case was tried, no contention having been made by the government during the trial that defendants were not in a position to complain of the illegal wiretapping—nor was such contention made even in its brief in the Circuit Court.

We submit there is no parallelism, such as is proposed, between the Communications Act and the two portions of the Bill of Rights; that the Circuit Court misconceived the effect of decisions under the Fifth Amendment; and that

the rule as stated with regard to the Fourth Amendment, though widely held, is not correct.

1. The doctrine that no third person can complain of evidence illegally seized is, it must be conceded, an old one. But while generally accepted by the lower Federal courts, it has not, heretofore, been considered by this Court. We suggest that there is no basis for the form in which this rule has been stated. Judge Learned Hand in *Connolly* v. *Medalie*, 58 F. (2d) 629, which reviewed the earlier authorities, suggested that "the power to suppress the use of evidence unlawfully obtained is a corollary to the power to regain it." That confuses two entirely separate matters. Obviously a motion for the return of illegally seized property can be made only by a person who is either the owner of that evidence or is entitled to its possession. The fact that most such motions include an application for the suppression of the evidence is no basis for holding that the latter motion depends upon the former. If that were so, even the owner could not make a motion for the suppression of the evidence if it had been voluntarily returned to him. Yet such voluntary return does not preclude a motion to suppress. See *Flagg* v. *United States*, 233 Fed. 481.

An examination of the early cases dealing with this subject shows that they gave little thought to the fundamental principles involved. The first two cases dealing with the subject were deportation cases in both of which the Court merely said that no constitutional right had been invaded. (*Moy Wing Sun* v. *Prentis*, 234 Fed. 24; *Tsuie Shee* v. *Backus*, 243 Fed. 551). The next two cases dealt with reasonable subpoenas and search warrants directed to corporations. There was thus no violation of the Fourth Amendment and since corporations have no privilege against self-incrimination there was no room for invoking the Fifth Amendment. (*Linn* v. *United States*, 251 Fed. 476; *In Re Rosenwasser Brothers*, 254 Fed. 171). Under

such circumstances the papers were lawfully before the Court and no person could object to their use.

However, in *United States* v. *Silverthorne*, 265 Fed. 853, Judge Hazel briefly discussed the matter and said that the rights given by both the Fourth and Fifth Amendments "are expressly for the benefit of the person or individual whose rights have been invaded, and to transfer such rights to a person who may believe himself injured by the violation of the rights of another would give such scope to the Fourth Amendment as was never contemplated." But that decision rested primarily upon the basis that the individual whose property was seized was willing that it should be used against him and his co-defendants. Of course, if the owner of the property does not object to its seizure at the time or ratifies it afterward, there has been no violation of the Constitution at all and the question here involved does not arise.

We submit, therefore, that the reasons generally given for the rule dealing with third persons are not sound. On the other hand, sound considerations of policy require a different rule. Surely the application of the Fourth Amendment should not depend on property considerations. Moreover, evidence seized from A is generally admitted also against B either because they are jointly accused of substantive crime or it is alleged they were co-conspirators. If they are so closely associated as to permit the introduction against each of otherwise irrelevant evidence it would seem but just that the relationship be considered sufficiently close to permit each of them to complain of unconstitutional seizures from the other.

The problem can best be viewed in the light of certain possible combinations of circumstances. To take the classic case of a liquor violation. There is an illegal search of a house. A still and other incriminating materials are found. The occupant of the premises and several of his employees

are arrested and indicted. The occupant moves for the return of the seized property and the suppression of the evidence. The motion is denied and the evidence is received. All of the defendants are convicted. On appeal it is held that the evidence should not have been received. Necessarily the conviction of all of the defendants must be reversed. We believe that this is the meaning of this Court's decision in the *Agnello* case, 269 U. S. 20. For in affirming the convictions of certain of the defendants, this Court was careful to point out that the evidence illegally seized from Agnello had not been used against any of these defendants. The implication is thus clear that had such evidence been so used their convictions could not stand. That in effect is also what happened in the *Weiss* case, *supra*, where the conviction of Goldstein was reversed although his wires had not been tapped. Any other result would be shocking to any conceptions of justice.

Should the rule be different merely because the government may not have indicted the occupant of the premises or, having indicted him, was unable to find him so that only the others went on trial?

Should not the true rule be that whenever the facts show an unconstitutional search and seizure the evidence obtained as the result of that search and seizure cannot be used at all? Otherwise the constitutional protection could successfully be evaded in large measure. To permit the search of A's home for letters written to him by B and the search of B's home for letters written by A, and the use of these letters against their authors, although they could not be used against their recipients, would be to permit a result wholly at variance with the policy of the Fourth Amendment.

We shall now pass on to the supposed parallelism between the Constitution and the Communications Act urged by the Circuit Court of Appeals in support of its position.

2. The conclusion that the same rule must apply to wire-tapping as to searches and seizures or to self-incrimination rests upon a misconception of the nature of the prohibitions involved in the Communications Act and the Fourth and Fifth Amendments respectively. We shall deal separately with each of these Amendments. The Fourth Amendment is general in terms and is designed to protect the citizen against governmental oppression. Its meaning has been determined by this Court from time to time in the light of that basic position and in the light of the historical events which led up to its adoption. See *Boyd* v. *United States*, 116 U. S. 616. See also Fraenkel, Concerning Searches and Seizures, 34 Harv. L. R. 361-367. The rule that evidence obtained in violation of this amendment should not be used in Federal prosecutions was based on the belief that such a rule was necessary in order to give vitality to the prohibition of the Fourth Amendment. See *Weeks* v. *United States*, 232 U. S. 383; *Silverthorne Lumber Company* v. *United States*, 251 U. S. 385; *Gouled* v. *United States*, 255 U. S. 298. Should this Court reject the considerations just advanced and accept the view of the many lower Federal courts that only a person whose own property has been illegally seized can object to the seizure, that view would no doubt rest upon the belief that, as a matter of policy, the constitutional protection could be given effective meaning without carrying it to the extent of assisting persons who had no property interest in the matter illegally seized. In interpreting the Constitution this Court is the final organ on matters of policy involved in weighing conflicting interests.

But in enacting legislation Congress exercises this power of declaring policy and in the Communications Act Congress has declared this policy in clear and unmistakable terms. It has not only made the interception of wires a

crime, but it has expressly prohibited the divulgence of such messages and any use of the contents of the same. Here the primary question is not, as in the case of the Fourth Amendment, that of protecting the individual against governmental oppression. Indeed when the interpretation of this statute first came before this Court two of its members believed that it was not aimed at governmental acts at all. (See *Nardone* v. *United States*, 302 U. S. 379 at 385). However, the majority of the Court held that the plain language of the statute controlled and that it constituted a prohibition against the divulgence of messages, whether by governmental agents or by any other persons. And the ruling that such messages could not be received in evidence was made, not in the process of determining that without such result the purpose of the statute would be frustrated, as is the basis of the decisions under the Fourth Amendment, but in the process of applying the plain language of the statute. Congress, in other words, having declared that no messages might be divulged, it was obvious that they could not be divulged in Court any more than outside of court. The rule which forbade the use of such messages as evidence is also an integral part of the statute itself. And within the four walls of the statute there is no room for any inference that a message could be divulged so long as the parties to the message were not defendants before the Court. For the statute says nothing about litigation or parties.

That there are several situations in which evidence obtained in violation of the Communications Act would be barred, although under similar circumstances it would not be barred under the Fourth Amendment, is quite clear. Thus it has been held that in a Federal prosecution evidence obtained by state officers, without previous cooperation with the Federal government, may be received. (See *Byars* v. *United States*, 273 U. S. 28, and *Gambino* v.

United States, 275 U. S. 310). And seizure by private individuals likewise does not make the evidence inadmissible. (*Burdeau* v. *McDowell*, 256 U. S. 465). It could hardly be argued that either private individuals or state detectives would be allowed to testify about conversations which they overheard through illegal wire tapping. The supposed parallelism between the two grounds of exclusion thus does not exist.

3. The further suggestion in the Circuit Court of Appeals (*R. 26*; 120 Fed. (2d) at 489) that there is some analogy between the rights under the Communications Act and the Fifth Amendment is likewise not sound. The implication that this Court has dealt with the Fifth Amendment in the same way that other courts dealt with the Fourth Amendment is also without foundation in the authorities. *Hale* v. *Henkel*, 201 U. S. 43, referred to by the Circuit Court of Appeals, does no more than decide that an individual cannot refuse testimony by urging the supposed immunity of someone else.

In any event the Fifth Amendment is in terms personal and comes into play primarily with litigation. If a witness on the stand does not object to giving testimony on the ground that it might incriminate him, no one else can object. To that extent it is correct to speak of the privilege as being personal only. On the other hand, if the witness does object and the objection is overruled, evidence has been received in violation of the constitutional guaranty and in such case most courts permit any party to the litigation to raise the question on appeal. That is recognized by the Circuit Court of Appeals which, however, believes the rule not sound.[4]

[4] Citing Wigmore (§ 2196 3rd ed. Vol. VIII, pp. 102, 104). It is, of course, natural that Wigmore should accept the position of the minority of the courts on this subject since he has always sought to restrict the rule against self-incrimination (see § 2251, p. 318) and has opposed the doctrine of this Court banning evidence obtained as the result of unconstitutional search and seizure (§ 2184, Vol. VIII, p. 31, ff).

The further contention in the Circuit Court of Appeals that its position is in accord with the law of privileged communications generally, in that it is only the disclosure which is privileged, overlooks the fact that most grounds of privilege are based on relationship, such as between husband and wife, doctor and patient or attorney and client and that the law forbids disclosure by one of the parties in that relationship. The various dictograph cases cited have, therefore, no application here. For here we have a statute, as already noted, which absolutely forbids divulgence of the communication, not merely disclosure by a person standing in a particular relationship to another.

We submit, however, that there is in this case no analogy either with the law of privileged communications generally, or with the law of self-incrimination as followed by that minority of the courts with which the Circuit Court of Appeals concurred. We are here dealing, not with privilege at all, but with the plain command of a clear statute that the illegal evidence be not used.

4. The Circuit Court suggested finally (*R. 26, 27;* 120 F. (2d) at 489) that because the statute permits the "sender" to consent to the divulgence of the message there must be an inference that the right to withhold divulgence is personal to him only. That completely begs the question. In every case of alleged wrong, no wrong was committed when the act complained of was consented to by the party involved, or even, in some circumstances, when it was ratified by him. Thus there can be no unlawful seizure where free consent has been given at the time of the taking. That by itself throws no light whatever on the question whether an unlawful seizure can be complained of by someone other than the owner of the property. The consent affects only the legality of the act, not the consequences of an illegal act.

The suggestion that such consent might be given after the event and thus nullify any protest which a third person might make also begs the question. It may be assumed that a consent may be given after the interception as well as before, although this does not appear as clearly from the decision in the *Weiss* case (308 U. S. 321), as the Circuit Court of Appeals suggests (at 489). In the *Weiss* case this Court held that the particular consent there relied upon was void because obtained by illegal means and the Court emphasized the fact that the original interception itself had not been consented to. However, assuming that a consent voluntarily given would be effective at any time, that still does not answer the question raised in this case. For here there was no consent to the interception at any time. If any acquiescence can be inferred from the fact that Messman turned witness for the government, that is negatived by the finding of the Circuit Court of Appeals that his becoming such witness was due to the very illegality itself. No consent can be inferred in such circumstances. (*Weiss* v. *United States*, *supra*.) In any event the consent of one party to a conversation is not enough. (*United States* v. *Polakoff*, 112 F. (2d) 888, cert. den. 311 U. S. 653.)

In the absence of sufficient consent the interception of the wires was illegal and, therefore, any divulgence of the messages or any use of their contents is prohibited. (*Nardone* v. *United States*, *supra*.)

It is, therefore, clear that in the case at bar Messman's evidence was the result of illegally intercepted messages and so barred by the plain language of the statute.

* * * * * * *

We believe that we have thus shown that the arguments advanced in the opinion below are lacking in substance. And the rule laid down is impossible of any application which is consistent and sensible. Let us see what, in practice, becomes of the rule promulgated by the Circuit Court.

that a witness may be precluded from testifying when induced to do so because of illegal wiretapping, but that this follows only if talks by the defendants were overheard. Surely the court did not intend to confine its application to a case where all the tapping involved a single defendant—that would give it so narrow a scope as to be meaningless. Yet if the requirement that conversations of objecting defendant be tapped have significance that tapping must have played a real part in getting the witness to testify. But where there are many defendants and the tapping is of all their wires and also the wires of others, how can the influence of the conglomerate tappings be unscrambled and attributed to particular defendants? Does not, in such a case, each defendant share in the objection raised to the tappings of others? And, if it should happen that the conversations of one of the defendants were never tapped can it be that the witness can testify against him alone? To such perplexities and absurdities are we driven if we follow the rule proposed below. No such complications result if the requirement that conversations of the defendants have been tapped be eliminated.

And in reaching that result we should not be deterred by any formula such as that constitutional rights are personal only. For in essence what the defendants are here urging is not that they can take advantage of a wrong done to another, but that a wrong is being done them. That can perhaps be illustrated by an extreme instance. This Court has set aside convictions obtained by the torture of the defendants. (*Brown* v. *Mississippi*, 297 U. S. 278, cf. *Chambers* v. *Florida*, 309 U. S. 227.) Surely the result would have been the same had the torture been applied to only one of the accused and he, in consequence, had testified against the others. These would have been entitled to urge, in their own right, that evidence so obtained could not be used against them. Is it conceivable that the prosecution

could be heard to say that the right to object was personal to the one tortured?

So, here, petitioner complains that a wrong has been done him by the use against him of testimony obtained in violation of the plain command of the law, obtained, moreover, by the agencies of government charged with the duty of enforcing the law. Whether that evidence consist of the wire taps themselves or of evidence obtained by the use of the wire taps it is condemned by the statute. It should, therefore, be barred irrespective of the circumstance that the wires of petitioner himself were never tapped, nor any of his conversations overheard.

Point II.

The District Court Unduly Restricted the Scope and Conduct of the Preliminary Hearing.

The Circuit Court of Appeals disposed of this contention in a rather summary fashion (*R. 30, 31;* 120 F. (2d) at 491, 492), indicating indeed that the issue was immaterial in view of its holding that petitioners could not raise the issue of the illegality of Messman's testimony and because the prosecution had not sustained the burden of proof as to the source of the testimony of that witness. On the second of these points the Circuit Court of Appeals is correct. It is only if this Court should reject the view of the Circuit Court of Appeals with regard to the taint on the testimony that the conduct of the preliminary trial becomes material.

It is submitted, however, that the Circuit Court of Appeals was not correct in supposing the issue to be immaterial if petitioners had no standing to question the taint. For it is precisely at the preliminary hearing that facts might have been developed to show that petitioners did have a standing to complain. Petitioners had no independent means of knowing whether their own wires or conversations had been tapped. Only a thoroughgoing examination of all

the documents and data in the possession of the government could disclose the facts.

1. It is clear that the Trial Court greatly restricted the investigation. This was concerned not primarily with the Government's right to call Messman and Garrow as witnesses, but with the Government's right to use any evidence at all, it being defendant's contention that all of the Government's evidence was obtained as the result of illegal wiretapping.

The Trial Court restricted attempts on the part of defendants to have the Post Office Inspector Shea and the insurance company's attorney Bernstein justify their general statements that they had evidence independent of the wiretapping. The Trial Court permitted these witnesses to give their conclusions and opinions as, for instance, when Shea said: "I knew we had a complete mail fraud case" (R. 280). This the court refused to strike out. (See also R. 308). Similar events occurred during the examination of the Assistant United States Attorney Dailey (see R. 625, 675, 753, 757).

The Circuit Court of Appeals recognized that in several instances the Trial Judge had expressed himself in a way "that seemed to restrict the examination unduly" (*R. 30*). It considered these matters not important because of the supposed "complacence" of the accused. It is somewhat difficult to know what this rests upon in view of the persistent effort on the part of defendants' counsel to pursue various roads which the Trial Court blocked.

2. Moreover, the Trial Court did not permit defendants to examine various documents relied upon by the witnesses as the basis of their testimony or to mark these in evidence. (See R. 292, 323, 340, 370, 638 and 307.) In view of the Trial Judge's unfamiliarity with the details of the case, it was impossible for him to determine whether or not

a particular document contained evidence which had been obtained through the use of the forbidden wiretapping. Counsel for the defendants should have had the right to see for themselves what the documents contained in order to pursue any leads which they might give.

That in consequence the Government might have to disclose some of the evidence which it intended to use at the trial is, we submit, an inevitable consequence of the Government's original wrongdoing in indulging in wiretapping. We do not suggest that the Trial Court does not have discretion in such situations. We do not doubt that the Trial Court could exclude matters which had no possible relation to the defendants on trial. On such a subject the Trial Court would be able to exercise its judgment and an independent check by defendant's counsel would not be necessary. This, however, is not the basis upon which the Trial Court proceeded in the case at bar.

On this aspect of the case the Circuit Court had nothing to say.

Point III.

The Trial Court's Charge Was Unfair.

This Court has held that the Trial Judge must use great care that in discussing the evidence he should not mislead or give a onesided impression. See *Quercia* v. *United States*, 289 U. S. 466; *United States* v. *Murdock*, 290 U. S. 389.

While the charge in the case at bar is not as forthright in its expression of defendants' guilt as was the charge in the *Murdock* case, we submit that it partakes of the essential qualities of the charge condemned in the *Quercia* case, being both misleading and onesided.

We recognize that in the Federal courts the trial judge has the right to comment on the evidence. We submit, however, that this right involves a duty to state the con-

tentions of the parties with some particularity and not to draw conclusions concerning guilt or so phrase his comments that the jury acquires the conviction that the judge has found the defendants guilty.

Particularly with regard to the petitioner, Schwartz, the charge of the court failed to meet the standards laid down by this Court. The charge is replete with rhetorical questions, all of which suggest the guilt of petitioner. At no time did the court indicate the contentions advanced by the defense which might have been answers to the questions posed. We especially have in mind three instances of unfairness.

1. In discussing the relationship between petitioner and Messman and Garrow, the court said (*R. 14;* R. 5145):

> "I suggest that you turn your minds back to Messman and Garrow as you observed them. I think that together they were on the witness stand a matter of about three weeks. I think you had an ample opportunity for appraising them. What do you say as to the impression that they would be likely to create on consultants? Would consultants be able to observe, during a period of dealing with those men, what their essential qualities were? Is it likely that the defendants Goldstein and Schwartz were sufficiently equipped with the powers of perception to fairly well appraise Garrow and Messman?"

This was a grossly unfair method of presenting the case. The court suggested to the jury that petitioner's relationship with Messman and Garrow should be judged on the basis of the impression which these people made at the trial. That was certainly unfair. It is well known that persons engaged in illegal activities may for years deceive their most intimate associates. In many cases these wrongdoers collapse after their wrongs have been discovered and exposed, particularly where, as here, they have been for

some time in prison. To attribute to their former associates knowledge of the individuals drawn from their subsequent conduct and appearance is improper. The jury had a right to consider the relationship of petitioner with these witnesses only on the basis of the evidence which was adduced dealing with that relationship. To permit the jury to find the defendants guilty because of the impression which Messman and Garrow made on the witness stand, is wholly improper. A fair judge would have cautioned the jury against drawing the inference that defendants were to be found guilty because of the bad impression made by these witnesses on the stand and cautioned them that the defendants should be judged only in the light of the circumstances which existed at the time of the acts of which they were accused.

2. Another instance is the notation with regard to digitalis. The court (*R. 16;* R. 5148) sought to convey the impression to the jury that Schwartz should have been suspicious because of the notation concerning digitalis. It was the undisputed testimony that the use of the digitalis did not carry with it any sinister implications at all, that it was a known fact that digitalis was used in many heart cases. As a matter of fact, until the publicity resulting from the original arrests in these cases and the recital of some of the facts, few heart specialists would have been suspicious of the mere fact that a patient had had digitalis. They would normally have assumed it to have been used in connection with the patient's condition. To give to the jury the inference that this was consistent with guilt was a step far outside the province of an impartial trial judge. Surely, in referring to the subject of digitalis, the Trial Court, if it intended to be fair, should have at the same time called the jury's attention to these facts, leaving it to the jury to determine, of course, whether there were any particular suspicious circumstances in the instances referred

to. But to suggest to the jury that there was something inherently suspicious about the digitalis itself was both misleading and unfair. The Government in its brief in the Circuit Court of Appeals (p. 66) suggested that the court was justified in not referring to the well known use of digitalis because that fact was not in dispute. That is indeed a strange view of a court's charge. Surely, it is just facts which are not in dispute which the court can and should mention to the jury without qualification, it being the jury's province to determine only the disputed facts. After all, the purpose of the charge is to inform the jury and what better information can it receive than a statement of relevant facts not in dispute?

3. The third illustration dealing with this petitioner related to the *Kaplan* incident. Messman had substituted sputum and had so informed Schwartz. It was Schwartz' contention that thereafter he broke with Messman. The Court, however, in its charge did not refer in any way to this contention and again asked a number of rhetorical questions (*R. 15;* R. 5146,-5147). Not content with emphasizing implications from this incident which might be unfavorable to the defendant, the judge underlined his remarks by saying: "I wonder if I make that clear to you" and then he repeated the same thing again, emphasizing that he thought it "most important." This discussion was followed by a reference to Schwartz' testimony before the Grand Jury, the exact meaning of which is certainly not clear. What is clear, however, is that the judge was intending to reflect unfavorably on the defendant.

It is significant that in the entire portion of the charge dealing with Schwartz there is not a single suggestion favorable to the defense nor even a single reference to the contentions of the defense. Every one of the rhetorical questions was designed to obtain an answer unfavorable to

Schwartz. Surely it will not do for a Court thus to assume the role of the prosecuting attorney and attempt to cover it up by saying that he was merely suggesting questions for the consideration of the jury.

The Circuit Court of Appeals, in dealing with the charge, suggested that it is seldom possible to say more in the accused's favor than that he denies complicity and that juries are not very much influenced by what judges say anyhow (*R. 29;* 120 F. (2d) at 491). It is submitted that both points are without merit. Whatever may be the robusticity of particular juries it is well known that other juries are susceptible to influence. And the rules laid down by this Court well take that into consideration.

And the suggestion that all that a judge could say about a defense is that defendant denies guilt is astonishing indeed. Particularly, in a conspiracy case, where the government relies on inferences to be drawn from circumstances, there are many things which can be said by a defendant in explanation of those circumstances. Whenever the circumstances give an appearance of guilt, innocence can be established only by explanation. While the explanation may often not be persuasive it is a defendant's right, it seems to us, to have the Trial Court call the jury's attention to the explanation given as well as to the Government's contention as to the inferences to be drawn from the circumstances themselves. And when a judge not only asserts the Government's view alone, but does it in such rhetorical form as to suggest to the jury only one possible answer, then we submit the judge has overstepped the bounds of his function.

In opposition to the petition for certiorari, the Government in its brief (p. 17) contends that there were no adequate exceptions to the judge's charge. Counsel for this petitioner, Schwartz, expressly excepted to the inference which the Court asked the jury to draw from the conduct

and appearance of Messman and Garrow (see R. 5154, 5155). There were similar objections to the references to the sputum incident (R. 5155) and to the digitalis (R. 5156). It may be observed, moreover, that the Court's reaction to the various objections was hardly of a character calculated to help the jury or to encourage counsel to be more explicit.

It is well settled that the Trial Court may not indulge in argumentative remarks and that he may not assume the role of an advocate. The cases are quoted in the note to the *Murdock* case in 78 Lawyers Edition at 398 and 399. We particularly call this Court's attention to the rule laid down in *Palno* v. *United States*, 58 F. (2d) 111; where the Court said:

> "The evidence should be stated fairly, both that in behalf of the Government and that in behalf of the accused."

And in *O'Shaughnessy* v. *United States*, 17 F. (2d) 225, the Court said:

> "When there is evidence supporting a verdict of not guilty, argumentative statements, based on recitals of incriminating evidence only, are not warranted."

The use of rhetorical questions somewhat similar to those here employed was condemned in *Weare* v. *United States*, 1 F. (2d) 617. See also *Minner* v. *United States*, 57 F. (2d) 506 and *Johnson* v. *United States*, 270 Fed. 168.

Under all these authorities it appears clear that the charge of the Court in this case, omitting as it did any statement of the defendant's contentions or the evidence in support of the defense and consisting primarily of hypothetical questions disparaging the defendant was unfair, misleading and argumentative. Regardless of any other question in the case it requires reversal.

As we have already indicated, the Circuit Court of Appeals upheld the charge although it recognized that the judge was asking questions which called for damaging answers on the ground that the intimations to the jury were "oblique" and on the ground that in other portions of the charge he had advised the jury that they were not to take his opinions as authoritative. We do not believe that this Court will sanction an improper charge merely because at various points the Judge gives lip service to his obligation and tells the jury that they are free to render whatever verdict they think proper. The damage to a defendant is no less severe. It is obvious that a jury will take the particular comment of the Judge more seriously than his general admonition. Especially is that true when the entire portion of the charge dealing with a particular defendant is of the character here complained of.

It will be noted that the general admonitions, so much relied upon by the Circuit Court of Appeals, appeared in the early portion of the charge before the Judge began discussing the individual defendants. From the time he began discussing these defendants separately, the only word of caution uttered was in relation to the credibility of witnesses. From that time on the entire discussion was in the form of hypothetical questions of more or less damaging character. The nature of these questions became progressively more unfavorable to the defendants. They reached their most serious character in connection with petitioners Goldstein and Schwartz, particularly, indeed, with regard to the latter. It is difficult to understand how the Circuit Court of Appeals was able to dispose of these persistent questions as merely "oblique" intimations or, where it found, in the many pages of the charge dealing with these two petitioners that the Judge had exercised "overabundant caution" in refraining from invading the

jury's province. And while it is true that the questions occurred in a long charge, they did not occur in isolated portions of that charge, but were concentrated in the only part of the charge dealing with the complaining defendants. It is even significant that the Judge abruptly ended his charge on this note without any repetition of his general admonitions to the jury. The final impression must clearly have been seriously damaging to the defense.

If a mere reading of the printed words shows this partisanship, how much more effective is it when delivered by the Judge in his robes to the twelve jurymen, who not only observe the deference and homage paid to the Court in the court room but themselves do likewise. Did not appellant Schwartz have to overcome an obstacle which no constitution or original rule of law ever intended that he should overcome? The statements to juries that they are the sole judges of the facts become as with "the tongue in cheek" if charges such as these are sanctioned.

We submit that the view of the Circuit Court of Appeals is contrary to that announced by this Court and the proper rule elsewhere recognized.

Conclusion.

It is respectfully submitted that to permit the conviction in the case at bar to stand would result in a substantial nullification of the purpose which Congress has made manifest in enacting the Communications Act. It is significant in this connection that Congress has repeatedly refused to amend this Act so as to permit wiretapping by government officials even in a limited class of cases and under strict supervision—and this despite the fact that such bills have been sponsored by the Attorney General.[5] Surely this Court

[5] See hearings in 77th Congress First Session on H. R. 2266 and H. R. 3091. See also H. R. 4228 of that Congress.

should not sanction an interpretation of the statute which runs counter to its general purpose, namely, the protection of the people from the "dirty business" of wiretapping. In any event a new trial should be ordered because of the unfair charge of the Trial Court and its improper action in restricting the conduct of the preliminary hearing inquiring into the extent of the wiretapping.

Respectfully submitted,

LESTER R. BACHNER,
Attorney for Petitioner, Schwartz.

OSMOND K. FRAENKEL,
Of Counsel.

APPENDIX.

Federal Communications Act, 47 U. S. C. 605:

"No person receiving or assisting in receiving, or assisting in transmitting, any interstate or foreign communication by wire or radio shall divulge or publish the existence, contents, substance, purport, effect, or meaning thereof, except through authorized channels of transmission or reception, to any person other than the addressee, his agent, or attorney, or to a person employed or authorized to forward such communication to its destination, or to proper accounting or distributing officers of the various communicating centers over which the communication may be passed, or to the master of a ship under whom he is serving, or in response to a subpoena issued by a court of competent jurisdiction, or on demand of other lawful authority; and no person not being authorized by the sender shall intercept any communication and divulge or publish the existence, contents, substance, purport, effect, or meaning of such intercepted communication to any person; and no person not being entitled thereto shall receive or assist in receiving any interstate or foreign communication by wire or radio and use the same or any information therein contained for his own benefit or for the benefit of another not entitled thereto; and no person having received such intercepted communication or having become acquainted with the contents, substance, purport, effect, or meaning of the same or any part thereof, knowing that such information was so obtained, shall divulge or publish the existence, contents, substance, purport, effect, or meaning of the same or any part thereof, or use the same or any information therein contained for his own benefit or for the benefit of another not entitled thereto;

Provided, that this section shall not apply to the receiving, divulging, publishing, or utilizing the contents of any radio communication broadcast, or transmitted by amateurs or others for the use of the general public, or relating to ships in distress."

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Supreme Court of the United States

OCTOBER TERM, 1941.

No. 256.

UNITED STATES OF AMERICA,
Appellee,

—against—

HERMAN RUBIN, impleaded with MAXIMILIAN GOLDSTEIN, BENJAMIN SCHWARTZ, *et al.*,
Appellants.

BRIEF OF DEFENDANT-APPELLANT HERMAN RUBIN.

HERMAN RUBIN,
Appellant pro se.

ALPERT PRESS, BROOKLYN, N. Y. TEL. TRIANGLE 5-1058-1059

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HERMAN RUBIN, impleaded with MAXIMILIAN GOLDSTEIN, BENJAMIN SCHWARTZ, *et al.*,

Appellants.

BRIEF OF DEFENDANT-APPELLANT HERMAN RUBIN.

This defendant appeals from an affirmance in the Circuit Court of Appeals of a judgment of conviction of using the mails to defraud, and conspiracy.

The jury recommended clemency (p. 5202) and a sentence of six months' imprisonment was imposed.

In order to spare this Court the time and effort which repetition here would entail, the writer, with the permission of counsel for the other appellants (and we hope with the approval of this Court) will adopt such of the recitals and arguments in their briefs which apply with equal force to this appellant as to the others.

Since it was understood at the trial that any objection by or ruling as to one defendant would be considered as made by and with respect to all the others (pp. 962-963), we pray that any determination in favor of the other appellants will be made with respect to this appellant Rubin.

THIS APPELLANT.

Rubin was a man who had little pleasure out of life.

Despite a limited education and many hardships he managed to be able to embark in his own business at the age of 25 (pp. 4306-7); he labored from 15 to 18 hours a day for 7 days a week and did not marry until he was 35 years old (p. 4308).

Much may be made of the fact that Rubin carried a large amount of insurance; but his father had died when he was 12 years of age and he had had to work hard (p. 4306). He therefore would be one to appreciate the value of insurance, and so in 1914, at the age of 20, he obtained his first policy of $2,000.00.

In 1922, he obtained $5,000.00 more; in March, 1927 he added $13,000.00 and in December, 1927 (which will be recollected as during "boom" times) he added $10,000.00 more; in April, 1929 he added $25,000.00 and in December, 1931, shortly after the birth of his boy he added the last $25,000.00, in which the baby was named as beneficiary, *but this last policy, significantly enough, made no provision for disability benefits* (pp. 4308-4309).

That policy was the nearest to the inception of his illness some four years later, but that insurance contained *no* disability benefits—and yet the man is now accused of carrying heavy insurance in pursuance of a scheme to defraud!

He was not given to collecting on insurance claims!

He had had two accidents. On one he filed no claim at all, on the other he settled for half (pp. 4310-4311).

Unlike the other claimants in this case, Rubin did not go to the Garrows specifically for his insurance claim; he had been represented by them prior to filing his claim here (pp. 4309; 4311-4312).

POINT I.

THE TRIAL COURT ERRED IN RULING THAT THE TESTIMONY OF MESSMAN AND GARROW WAS ADMISSIBLE AND IN LIMITING THE SCOPE OF THE PRELIMINARY HEARINGS.

In respect to these points, we respectfully ask the Court to consider the discussion of these questions as embraced in the briefs submitted on behalf of Dr. Maximilian Goldstein and Dr. Benjamin Schwartz with like effect as though repeated *in extenso* here.

It is, however, important to note that the intercepted conversations which affected this appellant Rubin numbered 35 (p. 148), and in some of them we believe he was the sender, so that he would have standing to complain of their divulgence, which was the point on which the opinion of the Court below turned.

POINT II.

THE CHARGE TO THE JURY WAS ERRONEOUS AND PREJUDICIAL TO DEFENDANT RUBIN.

In addition to the arguments presented by the appellants Goldstein and Schwartz with respect to the charge to the jury, this appellant specifically alludes to phases of the charge applicable to him alone.

The Trial Court, speaking of the defendant claimants including Rubin, stated (printed p. 11, fol. 19):

> "Of course it is a striking thing that each one of them asserted a heart condition. You have probably observed that."

And then later he referred to certain subjects for examination, including "what the defendant Rubin has revealed of himself and his mental and moral processes while he was a witness on this stand" (p. 11, fols. 19-20).

Due exception was taken to that portion of the charge that each asserted a heart condition and also where reference was made "to certain evidence which might be considered adverse to Rubin without reference to the explanatory evidence on the same matter" (p. 5157):

The Trial Judge sought an explanation of what counsel had in mind, but no explanation was given because no explanation could be given, since, as stated by Rubin's counsel: "I think your Honor should have referred not only to what *you* had in mind but also to evidence which was introduced in explanation on the same subject" (pp. 5157-5158).

This Court will discern that the main charge did not indicate what the Trial Court had in mind as revealing of Rubin "and his mental and moral processes." Whatever it was that the Trial Court had in mind should have been either elucidated in the charge or at any rate whatever evidence there was in explanation of the same features of the case should have been brought to the attention of the jury.

Rubin's attorney also took exception to the reference to Dr. Goldstein's letter (p. 18, fol. 32) which will undoubtedly be covered in Dr. Goldstein's brief.

Another error which arose in connection with the charge was the Court's refusal to charge the request numbered 10 (p. 5164) which read as follows:

> "10. In order for a claimant to recover on a claim for total and permanent disability, he need not be absolutely helpless" (p. 5093).

That is the law in New York State.

> (Concurring opinion of Davis, *J.*, in *Waldman* v. *Mutual Life Insurance Co.*, 252 App. Div. 448, 451; *Shabotzky* v. *Equitable Life Assurance Society*, 257 App. Div. 257 at p. 260.)

The Trial Judge refused to so charge because he said that it was not in issue here since it had reference to the test to be applied in a civil action (p. 5164).

However, it must be agreed that *if* Rubin *was* totally and permanently disabled by the tests which would have been applied in any civil action brought by him against his insurers, then he could not be guilty of fraudulently presenting a claim for total and permanent disability. Hence, this request should have been granted.

The same was true with respect to the requests to charge numbered 11 to 18 inclusive (p. 5093), all of which, without unnecessarily repeating them here, tended to define the term "total and permanent disability" as that term had been construed in the State Courts.

Thus, request number 11 which was denied (p. 5164), read as follows (pp. 5093-5094):

> "11. A claimant in such a case is fairly entitled to make claim for disability if he is disabled to such an extent that he is unable to perform services of the type required in commonly accepted occupations or forms of employment."

That request was eminently proper under *Weisser* v. *Travelers Insurance Company*, 258 App. Div. 755.

The request numbered 12 was proper under *Waldman* v. *Mutual Life Insurance Company*, 252 App. Div. 448, 450.

And so each and all of those requests could be justified under the cases heretofore decided in the State Courts.

Each refusal to charge entitled defendant involved to an exception (pp. 5166-5167).

Certainly defendant Rubin was entitled to have the jury thoroughly instructed on the subject of "total and permanent disability" because a man should not be convicted of fraudulently claiming something which actually exists as a fact. In short, if Rubin was in fact "totally and permanently disabled," even though the test applied be the test which would be employed in a civil action involving that question—indeed, just *because* that test would be *properly* employed in such civil action—then he could not be guilty of fraud in the presentation of any such claim.

These rulings were particularly harmful to this appellant in view of the fact that there was in this case no proof of the least guilt on the part of Rubin save from the lips of Messman and Garrow. Eliminate either one of them and there was no evidence of anyone's guilt.

The Government's own proof quite clearly demonstrated that Rubin was actually sick and disabled and that he was not simulating his condition.

In June, 1935, Dr. Lee of the Travelers Insurance Company, examining Rubin for reinstatement of his policy, *refused to recommend Rubin for disability benefits* (Govt. Ex. 149). Rubin probably had traces of impending illness as early as that June, 1935, although he didn't know it at the time.

He became really sick in October, 1935 (p. 4318).

On December 17th, 1935 Rubin went to Dr. Loewe (pp. 4326-4327)—and here is where the Government's own proof established this defendant's claim as bona fide.

Dr. Loewe's electrocardiogram (part of Govt. Ex. 56) indicated the presence of a "Q" wave in lead "3" and it stated that the man was suffering with "myocardial damage" (meaning damage of the heart muscle).

His certificate (also part of Ex. 56) recited "angina pectoris," "coronary artery disease," "muffled heart sounds; retinal sclerosis; cyanosis; poor response to exertion."

Certainly such findings are not characteristic of good health.

The Government produced Dr. Harold E. B. Pardee, who is probably recognized as the outstanding authority on cardiology in this country.

Dr. Pardee on his *direct* examination by the U. S. Attorney said, while looking at and being shown Dr. Loewe's December, 1935 electrocardiogram of Rubin, that it was normal *except* for a large "Q" wave in the third lead (p. 3361) and after further interrogation, he said (p. 3364):

> "But I *can* say that all of the Q waves that are found the *larger* percentage are present *in patients*

who have heart disease. If you had a *hundred* records *with* Q waves perhaps only *one* of those would be from a patient who did *not* have heart disease.

Q. Now, Doctor,—— A. (continuing) It might be two—*no, one is fair.*"

That from a Government expert, a prominent cardiologist, and on his direct examination!!

Dr. Levy, another Government heart specialist, practically coincided with that view (pp. 5053-5054; 5068-5069).

Dr. Wallach (one of Rubin's experts) testified to the same effect (pp. 4586-4587).

So that here we had an electrocardiogram of this defendant Rubin, which had been taken by an honest doctor in December, 1935, months and months before there was any claim of even a semblance of digitalization and it was pronounced by dependable witnesses, including *eminent specialists produced by the Government*, as indicative of heart pathology—and yet the jury convicted this defendant of participating in a conspiracy to defraud because he claimed in 1936—the following year—that he was afflicted with heart disease.

Assuredly, the errors in the Court's charge contributed to the conviction.

In early 1936, Rubin went to see the defendant Dr. Benjamin Schwartz (pp. 4329-4330).

Dr. Schwartz's electrocardiogram (Ex. W) was like Dr. Loewe's (Ex. 56).

Dr. Wallach said so (pp. 4586-4587).

Dr. Levy, one of the Government specialists, said they were "essentially the same" (pp. 5053-5054; 5068-5069).

Dr. Wallach, Dr. Pardee *and* Dr. Levy (the last two being Government witnesses) agreed that Dr. Loewe's e.k.g. of December, 1935 was pathological (pp. 3364; 4586-4587; 5053-5054; 5068-5069) and all this was as of a date many months *before* any digitalis was claimed to have been used, *before* any falsification of any symptoms was claimed to have been practiced.

Dr. Schwartz's e.k.g. (Ex. W) was therefore also pathological and his certificate regarding Rubin (Ex. 38) was therefore correct and true.

Then in August, 1936, Rubin went to defendant Dr. Maximilian Goldstein, who took an electrocardiogram.

That e.k.g. (part of Govt. Ex. 56) was also like Dr. Loewe's of the prior December (part of Ex. 56).

Dr. Wallach said that it was (pp. 586-4587).

He was not contradicted.

Government specialist Dr. Levy agreed that it was and said it was "suggestive" of heart trouble (pp. 5068-5070).

Dr. Pardee, as hereinabove stressed, had already characterized Dr. Loewe's e.k.g. as pathological (pp. 3361; 3364).

And then we go to the visit of Rubin to Prof. Wyckoff on September 8th, 1936.

Prof. Wyckoff made certain *ob*jective findings, *findings which could not be controlled by the patient.*

His report (Ex. 48) referred to a "slight pallor; slight cyanosis. * * * First sound at apex of poor muscular quality * * * short systolic murmur at apex."

Pallor, cyanosis (bluishness) and murmurs are *not* within the power of the patient to control (p. 1498).

These are all *ob*jective findings, every one of them indicative of heart pathology.

Defendant Dr. Maximilian Goldstein in his report (part of Ex. 56) had alluded, among other things, to the "cyanosis" and to "poor muscular quality" (of the heart).

Prof. Wyckoff found the same symptoms, *ob*jectively (Ex. 48), as did Dr. Goldstein (part of Ex. 56).

On what basis then rests the claim that defendant Dr. Goldstein's certificate (part of Ex. 56) relative to Rubin was false, when Dr. Wyckoff found the same *ob*jective symptoms?

Wasn't it funny that Dr. Loewe *and* Dr. Wyckoff *and* Dr. Wallach *and* Dr. Goldstein should *all* find cyanosis, which can*not* be controlled by the patient? (pp. 1498; 4586.)

Where was Prof. Wyckoff's electrocardiogram which would have shown if digitalis had been administered as testified by Garrow?

The Wyckoff report (Govt. Ex. 48) said "E.K.G. normal" meaning that the electrocardiogram was normal.

If it was normal, how could it have been influenced by digitalis to show disease?

The "summary" of his report showed that the man had symptoms of "cardiac insufficiency."

Was Prof. Wyckoff's report to be ignored?

Oh yes! They claimed that it had been "changed."

What was the "change"?

Miss Foster, Dr. Wyckoff's secretary, testified (p. 2865):

> "On reading the note expressing Dr. Goldstein's wishes Dr. Wyckoff said: 'Inasmuch as I have told the Doctor by word of mouth that he had a coronary disease, I see no reason why I shouldn't put it in the report!"

Thus, from the Government's own witness, it developed that Dr. Wyckoff had *actually told* Dr. Goldstein that this defendant Rubin really had a *"coronary disease."* Consequently, reciting that *fact* in the report should not have been portrayed before the jury as a "change."

Was Dr. Wyckoff to be disbelieved too?

WHY?

With a normal electrocardiogram, there could not have been any digitalization as testified by Garrow.

Dr. DeGraff, on behalf of an Insurance Company, examined Rubin on December 8th, 1936 (p. 2177).

His report (Govt. Ex. 46) showed "slight sclerosis of retinal arteries * * * A-2 greater than P-2 and slightly accentuated * * * *blood pressure near upper limit of normal.*"

These, though, were all symptoms which could not be controlled by the patient and, inasmuch as they existed, they could not but be evidence of a diseased condition and would exclude any claim of fraud.

Then a week after Dr. DeGraff examined Rubin, Dr. Costigan examined him on behalf of the Travelers Insurance Company (p. 2087).

He came *unexpectedly* and without an appointment (p. 2088).

It is vital to note that this doctor, who took no e.k.g. (p. 2097), found a bad heart.

He found a blood pressure of 164 over 100 and an overacting heart (pp. 2091; 2094; 2098).

A man cannot himself control his blood pressure nor his heart action (pp. 1499; 2096; 2098).

Admittedly digitalis cannot produce high blood pressure (pp. 1499; 2096).

Dr. Bensel, a Government witness, admitted that this blood pressure of 164 over 100 was well outside, or as he put it "without," the limits of normal (p. 2173).

Dr. Costigan said that high blood pressure, if not cared for, could lead to serious results (pp. 2095-2096).

His diagnosis was coronary sclerosis and hypertension (p. 2091).

Dr. Master, who unexpectedly visited Rubin on February 13th, 1936 (pp. 3323-3324; 3327) said concerning a murmur over the entire heart (p. 2284):

> "It may indicate nothing in the sense that it may be functional, and it may be associated with, very often, with hypertension. A systolic murmur is associated with hypertension, that is high blood pressure."

Dr. Master found a blood pressure of 170 over 94 and 160 over 90 (pp. 2275; 2279).

The murmurs and blood pressure cannot be controlled by the patient (pp. 1498-1499; 2096; 2284).

Dr. Bensel said that such blood pressure was with*out* normal limits (p. 2173).

This Court will observe that in propounding the hypothetical questions to the doctors produced by this defendant Rubin, his attorney was careful to enumerate principally

only objective symptoms (pp. 4579-4584; 4619-4622) which the patient could not control and which digitalis could not affect.

Based on those objective symptoms alone, his doctors said that he was suffering with an ailment, the effect of which was to totally and permanently disable him (pp. 4584; 4587-4588; 4592; 4622).

All that Dr. Levy would say was that the "Q-3" in Dr. Wallach's electrocardiogram was not pathological (p. 5057).

But Dr. Pardee, the outstanding cardiologist of this community, said of a precisely *similar* "wave" in Dr. Loewe's e.k.g. that it *was* pathological (pp. 3361; 3364).

If two such eminent authorities disagree, who are we to say that we know, who are we to say that because this defendant accepted Dr. Loewe's diagnosis (which Dr. Pardee impliedly approved) that he was a fraud?

Both Government witnesses, Dr. Bensel and Dr. Levy, admitted that angina and coronary artery disease could be present with normal blood pressure and a normal electrocardiogram (pp. 2171-2172; 5070).

It was therefore thoroughly established—and from competent Government witnesses—that this appellant was afflicted with coronary artery disease.

It is therefore apparent how Rubin was prejudiced by the Trial Judge's refusal to charge, as requested, on the subject of total and permanent disability.

The next question would be whether Rubin was in fact digitalized, whether he in fact participated with Garrow and Messman in this attempt to deceive the insurance companies.

There was certainly no digitalization at the time of the Loewe visit in December, 1935.

Garrow put the first digitalization in August, 1936 (pp. 2424-2425).

Messman put it in late September or early October, 1936 (p. 1567).

It is uncontradicted that a "Q" wave (such as appeared in Dr. Loewe's e.k.g.) can*not* be affected by digitalis (p. 4586).

Dr. Loewe was not in any way involved in this conspiracy.

Dr. Pardee said that Dr. Loewe's e.k.g. showed heart trouble (pp. 3361; 3364).

Dr. Levy said it was "suggestive" (pp. 5053-5054; 5068-5069).

In December, 1935 then, the electrocardiogram of an honest doctor, long before any claimed digitalization, showed heart trouble.

Let us see whether Messman and Garrow were to be believed rather than reputable physicians, many of them Government witnesses.

From the time of his arrest up to the time of this trial, being paid at the rate of $100.00 per week for a period and $65.00 per week for other periods, Messman had collected from this Government over $11,200.00 plus hotel expenses during part of the time (pp. 967; 1278-1280; 1477).

This Court in its opinion in the *Weiss* case (308 U. S. 325 at p. 339) alluded to the fact that Messman's license to practice medicine had not been revoked and that he was the recipient of a salary from the Government.

Indeed, he was receiving $65.00 per week during the Winter of 1939 to 1940, even while engaged in his own private practice (pp. 1477-1478).

For this he was willing to trifle with the liberties of innocent men, he was willing to review more than 3,000 files with insurance companies' attorneys (p. 1280), to review them on occasion as often as ten times a day (pp. 1481-1482).

Why the need to review over 3,000 files if he had only participated, as he testified, in some 60 to 100 fraudulent claims with the Garrows and approximately a dozen with the Weisses (pp. 1293; 1585), unless to enable the insurance companies to attempt to escape responsibility in those other 2900 cases, all at the expense of this Government?

Messman claimed that he told Bernstein (one of the attorneys for the insurance companies) that he couldn't live on the money which he was receiving from the Government and that he directed Bernstein's attention to notices which he received respecting payments falling due on medical appar-

atus purchased by him on the installment plan (pp. 1480-1481).

Why tell that to the attorneys for the insurance companies if he wasn't selling his willingness to testify falsely against these defendants in order to aid the insurance companies in defeating just claims?

What a travesty that Messman, the biggest culprit of all in this entire prosecution, should have been permitted to practice his vocation during the Winter of 1939-1940 at the expense of the Government and to purchase his liberty and livelihood at the altar of these defendants' conviction!!

Garrow presented an equally striking example of unworthiness.

He knew from Rubin's attorney, Schneider (p. 4640), that Rubin had been to Dr. Wallach at the instance of his trial counsel, Mr. Loeb, so, in order to offset Wallach's testimony, Garrow said that *he* had sent Rubin there (p. 2478).

He spoke of Wallach as one of the "doctors that I knew" (p. 2478).

He spoke of him as "Wallach Kaufman" (p. 2478), a name which he repeated on cross-examination (pp. 2954; 2955; 2956), but when it was brought to his attention that there was no such person in existence, he said, "Wallach Kaufman, Kaufman Wallach, it is the same man" (pp. 2956-2957).

To him truth or falsity, accuracy or inaccuracy, made no difference.

And then, to cap the climax, he said, "I did *not* know those men" (p. 2956).

If Wallach was one of the "doctors whom he (I) knew" (p. 2478), why didn't he know his right name? Why did he have the doctor's name twisted? And how reconcile it with his later statement that he "did *not* know those men" (p. 2956)?

He said he sent Rubin to Dr. Wallach because Wallach had issued a favorable report regarding a man named Kaplan (pp. 2955-2956); yet it appeared that Rubin had been to Dr. Wallach in December, 1937 (p. 4572), Kaplan didn't

go to Dr. Wallach until June, 1938 (p. 4613), and yet Garrow somehow convinced the jury that he sent Rubin to Wallach in 1937 because Wallach rendered a favorable report on Kaplan in 1938!!

Where could one begin to believe any such perfidy?

Yet the verdict of guilty which the Government now seeks to sustain meant that Garrow and Messman told the truth and that all the others did not.

Even in their falsehoods, Garrow and Messman could not agree.

There was indeed nothing to this case when calmly and dispassionately viewed in an atmosphere free from the "mass hysteria" of falsities as to numerous defendants heaped upon falsities as to the others.

Had not the errors in the charge been committed, the verdict might well have been one of acquittal.

POINT III.

THE TRIAL COURT ERRED IN PROHIBITING RUBIN FROM PROVING HIS PHYSICAL CONDITION SHORTLY BEFORE THE TRIAL.

Through Dr. Irving R. Roth, a heart specialist (p. 4615), defendant Rubin sought to establish what was disclosed by a physical examination conducted November 21st, 1938 (p. 4616).

The United States Attorney objected on the ground that the examination was too remote from the period covered by the indictment (p. 4616) and when the writer sought to ascertain whether certain *ob*jective findings would enable the examining physician with reasonable certainty to determine for what length of time they existed, the Trial Court sought to pass off the question with the observation that that "would be an opinion" which, in the absence of an examination would not be helpful (p. 4617).

Counsel for Rubin submitted that the *ob*jective findings in November, 1938 (which we attempted to establish as the

result of the doctor's "examination") would be helpful when coupled with the findings as presented by the Government witnesses and exhibits, but the Court suggested that there was already an abundance of testimony as to what physicians found during that time (meaning the period covered by the indictment) and the evidence was excluded (p. 4618).

If the "abundance" of evidence to which the Court referred was the evidence furnished by Doctors Schwartz and Goldstein, it suffices to say that their evidence was under attack in this very trial as being fraudulent and it would not be of assistance to this appellant.

If it meant the evidence of the Doctors called by the Government, certainly Rubin should not have been concluded by that.

Rubin was entitled to show by *independent* proof what his *exact* physical condition was on dates subsequent to those involved in the indictment, viz., November 21st, 1938 and May 29th, 1940 (p. 4619) and the exclusion of that evidence was highly prejudicial, to which exception was duly noted (p. 4618).

Rubin was prejudiced by these rulings in two aspects.

Firstly, he should have been allowed to establish that positive findings or symptoms existent in 1940 would enable his expert to state the length of time that those conditions had *previously* existed, wherefrom it would appear that his prior claim of total and permanent disability was *not* fraudulent and was *not* the result of medication, fake hospitalization or any other element of deception.

Secondly, it was important for Rubin to show that he was in fact "permanently" disabled and to that end it was important for the jury to note that as recently as May 29th, 1940 and practically on the eve of the trial, Rubin was in fact so afflicted. In other words, unless Rubin was disabled at the time of the trial, it would lend credence to the claim of the Government that he was not in fact "permanently" disabled when he originally presented his claim—and hence the exclusion of evidence as to this very vital feature of his claim was of the utmost and vital injury to him.

Thus, the Court specifically charged the jury that as to Rubin the question was if there was a physical impairment, "was there permanent, total disability. Or could the appearance of permanent and total disability be established only through the employment of fraudulent methods and means?" (p. 11, fol. 19). And a few minutes later, again as to Rubin, the Court said the question was whether he misrepresented his actual condition in order to induce the companies to believe that he was permanently and totally disabled.

It was therefore of the *utmost* importance that Rubin establish the *fact* of the *permanency* of his condition and he should have been permitted to establish the disabling character of his condition at the very inception of this trial so that, if Dr. Roth's testimony was accepted, the jury could conclude that Rubin was in fact permanently disabled—and of course if he was in fact permanently disabled then his claim to that effect could not be fraudulent.

Should he not have been permitted to prove the conditions as they existed even at the very eve of this trial and should not the doctor have been permitted to state how long those conditions had existed, based on his observations, from which could have followed the conclusion that Rubin's claim at its very inception was well founded and not fraudulent?

This, then, was an exceedingly vital ruling, highly prejudicial to Rubin's defense.

POINT IV.

THE JUDGMENT OF CONVICTION SHOULD BE REVERSED AND A NEW TRIAL ORDERED.

Respectfully submitted,

HERMAN RUBIN,
Appellant pro se.

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Supreme Court of the United States

October Term—1941.

No. 256.

DR. MAXIMILIAN GOLDSTEIN, DR. BENJAMIN SCHWARTZ, HERMAN RUBIN and IRVING ELENTUCH,

Appellants,

—*against*—

UNITED STATES OF AMERICA,

Respondent.

REPLY BRIEF OF PETITIONERS GOLDSTEIN AND SCHWARTZ

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INDEX

PAGE

POINT I

The evidence at the preliminary hearing showed that the Government's case was contaminated by the use of illegal wiretaps and the trial court made no finding to the contrary 2

(a) As to the findings of fact made by the trial court 2

(b) As to the facts established by the evidence ... 4

1. As to the sources of the Government's evidence 5

2. As to the use of wiretaps to obtain the confession of Messman and Garrow 9

3. As to the use of the wiretaps in the course of preparation for trial 11

POINT II

The Government's use of the intercepted communications to obtain the testimony of Messman and Garrow was a violation of Section 605 13

POINT III

Petitioners have a standing to complain of the Government's violation of Section 605 16

Conclusion 19

TABLE OF CASES CITED

	PAGE
Adams v. New York, 192 U. S. 585	16
Grant v. United States, 227 U. S. 74	19
Nardone v. United States, 302 U. S. 379	14, 17
Nardone v. United States, 308 U. S. 338	14, 17, 19
Norris v. Alabama, 294 U. S. 587	4
Olmstead v. United States, 277 U. S. at 470	17
Silverthorne Lumber Co. v. United States, 251 U. S. 385	19
Smith v. Texas, 311 U. S. 128	4
United States v. Appalachian El. P. Co., 311 U. S. 377	4
Weeks v. United States, 232 U. S. 383	16
Weiss v. United States, 308 U. S. 321	15

STATUTES CITED

Constitution of United States, Fourth Amendment	16, 17, 18, 19
Federal Communications Act, Section 605 (L. 1934, Ch. 652, 48 Stat. 1064, 1103; U. S. C. Title 47, Sec. 605)	1, 2, 3, 13, 16, 17, 18, 19

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REPLY BRIEF OF PETITIONERS GOLDSTEIN AND SCHWARTZ

The Government has made five points in attempted support of the judgment of conviction (Br. pp. 9-13). We feel that two of them, those concerned with the scope and conduct of the preliminary hearing and with the charge of the court to the jury, have been sufficiently anticipated in petitioners' main brief and require no further treatment here. We shall deal only with the contentions with regard to the evidence adduced in the preliminary hearing and with the interpretation to be given Section 605 of the Communications Act.

POINT I.

The evidence at the preliminary hearing showed that the Government's case was contaminated by the use of illegal wiretaps, and the trial court made no finding to the contrary.

The Government seeks to avoid the determination of the principal question presented by this appeal, that concerned with the interpretation of Section 605, by arguing (a) that the trial court found as a fact that the Government had made no use of the illegal wiretaps and (b) that the finding is sustained by the weight of the evidence. Each of these contentions is unsound.

(a) *As to the findings of fact made by the trial court.*

Concededly the trial court did not find "in so many words" that wiretapping had played no part in obtaining the Government's evidence (Resp's Br. p. 15). Moreover, the record as a whole shows that the trial judge did not intend to make such a finding and that he intended to hold only that the defendants had not satisfied the burden of proof which he erroneously imposed upon them.

Although the Government conceded at the opening of the preliminary hearing that wiretapping had been employed (R. 118), the Court did not then shift to the Government, as he should have done, the burden of producing witnesses to prove that this wiretapping had not entered into the preparation of the Government's case. Instead, the entire proceeding was conducted upon the assumption that the defendants had the burden of proving that the Government's case had been thus contaminated. Witnesses were called by the defendants. Although each of these witnesses was closely affiliated with the prosecution, each was considered a wit-

ness for the defendants and the defendants were held to be bound by his testimony. Various statements of the Court throughout the hearing indicate that he was proceeding on the assumption that the burden was upon the defendants (R. 348, 424-5).

At the conclusion of the hearing the Court made no express finding to the effect that the Government's case had not been contaminated by the use of "wiretaps". In fact the Court expressly reserved the right to the defendants to object to testimony as it was introduced at the trial (R. 614, 615), thereby indicating that the Court did not intend to make any final determination. It is true that defendants' objections made at the trial to the competency of Messman and Garrow were overruled. This ruling, however, does not necessarily indicate that the Court had found as a fact that the testimony of Messman and Garrow had not been obtained by the use of wiretaps. The ruling is equally consistent with the theory that the Court had found merely that the defendants had not proved the contrary. The Circuit Court correctly so construed the rulings of the District Court. Since, concededly, the burden of proof should not have been placed upon the defendants, it necessarily follows that error was committed in permitting Messman and Garrow to testify, unless Section 605 is construed in such a way as to make the testimony admissible regardless of how it was obtained.

Moreover, even if an assumption be justified that the trial court found that the testimony had not been induced by the wiretapping, such finding cannot stand in view of the fact that it was arrived at through a misconception of the law. The trial court proceeded upon the assumption that the burden of proof was on the defendants. That assumption, which it is conceded was erroneous, necessarily vitiated any finding which the Court might have reached. Such is the

well-settled rule in the case of jury verdicts, where a jury had been improperly instructed with regard to the burden of proof. The rule must be the same where the trier of the facts is a judge sitting without a jury. The statement of the Circuit Court of Appeals, to which reference is made by the Government in its brief (p. 15) to the effect that it would have not have set aside a finding by the trial court had one been made, must be read in the light of the facts. It obviously means only that had the trial court made a finding upon a proper understanding of the law, that finding would not have been set aside. Since that was not the situation here, the Circuit Court's statement has no significance.

It is, therefore, not possible for the Government to argue (Br. pp. 8-9) that the case comes to this Court buttressed by findings of facts of two courts. Moreover, the rule relied upon by the Government in this respect is not inflexible. There are many instances in this Court, particularly where constitutional issues are involved, in which this Court has set aside findings of fact concurred in by two courts, both in cases arising in the Federal system itself and in cases coming from the State Courts. (See *United States* v. *Appalachian El. P. Co.*, 311 U. S. 377; *Norris* v. *Alabama*, 294 U. S. 587; *Smith* v. *Texas*, 311 U. S. 128.)

(b) *As to the facts established by the evidence.*

Petitioners believe it to be clear that even if the trial court had found as a fact that the Government's case was not contaminated by the use of wiretaps, such a finding would have been against the weight of the evidence. The evidence showed three respects in which wiretapping was of considerable importance to the Government:

(1) As a source of evidence in the first instance, apart from the testimony of Messman and Garrow.

(2) As a means of obtaining the confessions and the testimony of Messman and Garrow.

(3) As a means of refreshing the recollections of witnesses in the course of preparation for trial.

The evidence with respect to each of these aspects will be briefly considered.

(1) ***As to the sources of the Government's evidence.***

Both at the preliminary hearing and in its brief in this Court the Government, in marked contrast to the position taken by it prior to the decision of this Court in the *Weiss* case (Petitioner Goldstein's Br. pp. 9 ff.) has attempted to minimize the importance of the illegal wiretapping in the investigation and preparation of this case. As a matter of fact, wiretapping permeated that investigation from the outset. A brief chronological summary of the various steps in that investigation, as disclosed by this record, will make that clear. Those steps were as follows:

1. Bernstein saw Kipnis sometime in August 1936 (R. 182) at which time on Bernstein's statement "Kipnis had fully confessed to us and made a statement" (R. 234). This is *not* the statement referred to as Kipnis' confession (Government's Exhibit 5—dictated October 8, 1936).

2. August 1936—Room recordings and extension telephone interceptions commenced (R. 182). They were used intermittently at Kipnis' office (R. 183) and at Friedman's office (R. 186-7).

3. Telephone extension interceptions took place prior to the date of Kipnis' dictated confession. These inter-

ceptions were Defendants' Exhibit D (dated September 16, 1936); Defendants' Exhibit F (dated September 2, 1936); and Defendants' Exhibit H (dated September 15, 1936).

4. Kipnis dictated his confession—October 8, 1936 (Government's Exhibit 5).

5. Despite the confession dictated by Kipnis the telephone extension interceptions continued. Defendants' Exhibit G, November 7, 1936; Defendants' Exhibit L, consisting of three wiretaps of October 22, two of October 23, two of November 10, and one of November 5, November 13 and November 16.

6. The matter was presented to the United States Attorney's office and Post Office Inspector Shea was assigned to make the investigation on November 27, 1936 (R. 117).

7. Shea rendered his report of thirteen pages without any independent investigation on December 6, 1936, nine (9) days after the matter was assigned to him.

8. After Shea rendered his report the wiretapping by the insurance companies continued. (Defendants' Exhibit L—December 7; 9 [two wire taps]; 22; 24, 1936 [two wire taps]; January 11, 1937; January 13, January 29 [two wire taps]; February 8; February 18; Defendants' Exhibit C, February 12, 1937; Defendants' Exhibit I—February 1, 1937; Defendants' Exhibit J—December 14, 1936; Defendants' Exhibit K—January 2, 1937.)

9. In January, 1937 a conference was held at the United States Attorney's office (R. 301).

10. As a result of that conference, Messman's wires were tapped from January 29, 1937 to April 16, 1937 and from May 6, 1937 to May 20, 1937 (R. 101).

    The wires of Messman and Garrow were tapped between March 2, 1937 and March 5, 1937; from March 8, 1937 to April 16, 1937; and again from May 6, 1937 through May 20, 1937 (R. 101-102).

    The home and office telephone wires of Joseph J. Weiss were tapped from March 8 through April 16, 1937; and from May 6 through June 30, 1937 (R. 781).

    The transcripts and phonograph records were turned over to the United States Attorney and were indexed.

11. No investigation other than the wiretapping was made by the Government until after the arrest (R. 809).

12. In the preparation of trial briefs for the *Weiss* case, resort was had to the wiretaps. (Defendants' Exhibit M [Nelson's trial brief]; Defendants' Exhibit X [Messman's trial brief] See R. 525 ff.)

It thus appears that wiretapping was employed at every step of the investigation, both before and after complaint was made by the insurance companies to the Government. It also appears that in January, 1937, when the results of the insurance companies' investigation were made available to the United States Attorney, prosecution was not undertaken until after further extensive wiretapping had been carried out. The reasons for this deferment of action are entirely clear despite professions that the wiretapping was only for corroboration. The United States Attorney, and the attorneys for the insurance companies, at their conference in January, 1937, must have decided that the evidence theretofore acquired by the insurance companies was not

sufficient and that further evidence must be obtained by means of wiretapping before the Government could safely embark upon a prosecution. This is the only inference possible from the admitted facts.

Certainly, the Government offered no proof to dispel such an inference. Although the Government relies primarily on the confession of Kipnis as its most important "independent source", that confession was not revealed at the preliminary hearing in its entirety. No testimony was offered as to the circumstances under which Kipnis decided to confess; and Kipnis himself, although at all times in the control of the Government, was not produced as a witness.

It was generally recognized that Kipnis was not worthy of belief unless corroborated. (See opinion of Circuit Court, fol. 36.) Moreover, it is clear that Kipnis did not implicate petitioner, Schwartz. In the long testimony given by Assistant Attorney Dailey purporting to show independent grounds for the prosecution, there is also no reference to Schwartz whatever. And when counsel sought to question Inspector Shea more particularly with regard to individual defendants, the Court would not permit such questioning (R. 286, 301, 306). While Bernstein stated that he had information from sources independent of telephone conversations prior to the arrest (R. 256) and named Dr. Goldstein, but not Dr. Schwartz, as one of the persons concerning whom he had such information (R. 258), the nature of the information was not disclosed. There is no indication that it was even of a criminal character. So in the instances in which references to Goldstein were made (R. 396, 467), it appears merely that his name was known.

It is apparent, therefore, that, aside from the unreliable testimony of Kipnis (who was not called as a witness at any stage of the hearing or trial), there is no basis whatever for the statement of the Government that it had evidence

criminally implicating petitioners without recourse either to the wiretapping itself or to the testimony of witnesses obtained as the result of wiretapping.

(2) ***As to the use of wiretaps to obtain the confession of Messman and Garrow.***

In support of its contention that the evidence showed that Messman and Garrow were not persuaded to turn state's evidence as a result of being confronted with the wiretaps, the Government relies entirely upon the fact that Messman and Garrow so testified at the preliminary hearing. With respect to Messman the Government states (Br. p. 28) that:

> "There is no evidence contradicting Messman's testimony as to his own mental processes and his explanation is clearly plausible."

We believe that this assertion, which is the nub of the Government's argument, is manifestly fallacious. Obviously, there could be no direct testimony as to the operations of Messman's mind other than that presented by Messman himself. The other evidence in the case, however, demonstrates so conclusively that Messman's statement was untrue that even if the trial court had based a finding of fact upon that statement, the finding should be reversed as a matter of law.

The Court below said in its opinion (fol. 38):

> "He confessed that he was abandoned in morals, ready to do anything that would serve his turn, and showed himself utterly untrustworthy. It is indeed curious, if he had made up his mind to change front before he was arrested, that he failed to confess when he was first before the district attorney and waited until after Nel-

son had dilated upon the amount of evidence which had been accumulated against him. One would have expected that on his own story his arrest would have been enough to touch off his confession."

And with respect to Garrow, the Court below recognized that "his word was, if possible, even less reliable than Messman's" (fol. 39).

In view of these characterizations of the two witnesses by the Circuit Court of Appeals, it is apparent that their denials are entitled to no substantial weight whatever. On the other hand, the undisputed facts show that the wiretapping played an important part in inducing them to testify. In the case of Messman the time element is of such a character that the part must be considered to have been a conclusive one. He acquiesced in the Government's request that he testify for it only after he himself had been advised that extensive wiretapping had been indulged in, only after he had been placed in a cell with Nelson to whom an important incriminating message had been divulged by the Government, and only after Nelson had advised him of this message, the importance of which Messman himself fully understood (R. 515-6).

It must also be borne in mind that the Government made every effort to get various of the conspirators to agree to testify against others and to that end, and for that express purpose, called their attention to the fact that their wires had been tapped. Dailey testified that he told Messman and others about the wiretapping because he thought that would influence them to confess (R. 319, 375, 376, 833, 858, 859). He said:

"Q. Now isn't it a fact, Mr. Dailey, that the Government did use these taps for the purpose of inducing everybody they could induce to plead guilty? A. That

was certainly one of the purposes that they were called to their attention for" (R. 860).

In view of this objective on the part of the Government, it is difficult to see how it can now be heard to say that, having used the wiretaps in order to get the witnesses to testify and having succeeded in getting the witnesses to testify, nevertheless, the result was accomplished without the use of the illegal means.

(3) ***As to the use of the wiretaps in the course of preparation for trial.***

Obviously the Government's attorneys must have studied the wiretaps, even before the arrest of any defendant. Miss Schwartz testified that she prepared an index of all of the discs and of the summaries by means of which it was possible immediately to lay one's hand on the discs of any particular individual (R. 272, 273). Mr. Dailey testified at the preliminary hearing that they began getting summaries of the wiretaps within three or four days after wiretapping was first indulged in (R. 312). Asked what he did when the wiretaps were received, he said that they were filed away:

"* * * except we might discuss, when a tap came in that sounded as though it were good, we might discuss it among ourselves.

Q. Wasn't the first thing that was done to hear it? A. No.

Q. Or read it? A. We read the stenographer's summary of it" (R. 313).

He also admitted that he made disclosures of the contents of the taps in several instances, mentioning expressly Nelson and Berger and saying: "There may be three or four others,

I can't recall" (R. 315). The selection of the particular conversation with which Nelson was confronted on the day of his arrest was not accidental. The statement of the United States Attorney to the press at the time of the arrest, to the effect that "as a result of thousands of records of actual conversations" he possessed evidence which would lead to the conviction of the defendants (R. 454-5), was not inadvertent. And his statement in the summation at the *Weiss* trial, that the wiretaps were the "crux of the case" (R. 445-6) was not erroneous.

Concededly, the wiretaps were used in the course of preparing witnesses for their testimony in the *Weiss* case. The *Weiss* case cannot be divorced from the present case as far as this question is concerned. Both Weiss and Garrow were indicted at the same time and were named in one indictment (R. 388). Both cases were prepared together for presentation to the Grand Jury, and this preparation took place at a time when the Government was laboring under the mistaken impression that intrastate conversations could be used.

The wiretap evidence had been acquired over a period of many months and through the expenditure of many thousands of dollars. It is inconceivable that this evidence was entirely neglected by the prosecution.

POINT II.

The Government's use of the intercepted communications to obtain the testimony of Messman and Garrow was a violation of Section 605.

In its brief in opposition to the application for certiorari (p. 16, Note 9) the Government expressly conceded that the alternative ground advanced by the Court below, namely, that the statute prohibited only divulgence, not use, was erroneous. Now, however, the Government contends that, wholly apart from the question of petitioners' standing to complain, the statute was not violated by the use of the intercepted messages to obtain the confessions of Messman and Garrow. The Government seeks to escape the application of the "divulgence" portion of the statute by arguing that there must be a divulgence of a particular message and it seeks to escape the force of the "use" portion of the statute by contending that the use must be for the purpose of private financial gain. Neither of these contentions has any merit.

The first contention (Br. pp. 39-42), that there is no divulgence unless the contents of a particular message is revealed, is without support either in the words of the statute or in the facts of this case. The statute expressly bans divulgence, not only of the contents, but also of the existence of intercepted messages. Surely if the Government intercepts a series of messages by different persons and then advises one of them that it has done so, as it advised Messman in this case, the Government has thereby divulged the existence of those messages even though it may not have identified any particular communication. It has also disclosed the contents of the messages as well, for a mere description of their general nature is a divulgence of their contents. The contents of the series of messages may be disclosed without reference to any specific message. There

can be no doubt, therefore, that this conduct is forbidden under the plain language of the statute. Any other construction would deprive the statute of all meaning.

In any event the record discloses that in the case at bar a particular message was divulged to Messman. The Government induced him to testify, not only by telling him that his wires had been tapped, but also by placing him in the same cell with Nelson (R. 430). Nelson had previously been confronted with a particular message and he told Messman about it (R. 431, 858). That message was a significant one, being definitely incriminating (R. 860, 861). It referred to an incident which directly involved Messman, since the conversation which was intercepted took place in Messman's office and in his presence. At the hearing Messman testified that he knew what it referred to (R. 515, 516). There was thus a violation of the "divulgence" clause of the statute.

There was also a square violation of the "use" clause. As we have shown, the Government used the series of messages as a direct inducement to Messman to plead guilty and testify. It also used the contents of a particular message for the same purpose. The fact that the latter was done indirectly through Nelson is of no consequence. Moreover, in addition to this use of the contents of the messages, there was undeniably a use of their existence (R. 430, 431). This in itself is sufficient to make out a violation of the statute.

There is no basis for the assumption that a disclosure to Government officials and the use by them of such disclosure was permissible. Since this Court, in the first *Nardone* case (302 U. S. 379), held that the Government was not entitled to divulge intercepted messages, it is clear that use for the benefit of the Government is a use "for the benefit of another not entitled thereto", as provided in the statute. Indeed, the decision in the second *Nardone* case (308 U. S. 338),

would be meaningless had this Court not so construed the statute. And in the *Weiss* case (308 U. S. 321) this Court also indicated that a use of the character here involved was barred. It is wholly immaterial, therefore, that the interceptor may not have acted out of motives of private gain for himself or another.

The rule with regard to confessions relied on by the Government (Br. p. 44) has no application here. For an involuntary confession is barred, not because of violation of statutory command, but because of the general belief that a confession so obtained is unreliable. If, therefore, the facts indicated can be independently established, there is no objection to their use.

Finally, the Government contends that the connection between the tapping and the testimony was attenuated, and that therefore the result was free from taint. That of course involves a weighing of the evidence. We have previously demonstrated, both in the main briefs and in this reply brief, that this contention is unfounded in fact.

POINT III.

Petitioners have a standing to complain of the Government's violation of Section 605.

The Government contends (Br. p. 46 ff.), following the reasoning of the Court below, that the rule of construction which has heretofore been applied to the Fourth Amendment should likewise be applied to Section 605. As we have already demonstrated (Petitioner Schwartz' Br. pp. 14-18, Petitioner Goldstein's Br. pp. 19-25), the answer to this contention is twofold: (1) the rule of construction adopted by the lower federal courts with respect to the Fourth Amendment is erroneous and does not merit the approval of this Court, (2) in any event no proper analogy can be drawn between the Fourth Amendment and Section 605.

(1) The real purpose of the Fourth Amendment is broader than the mere protection of the person whose property has been unlawfully seized. That person may obtain redress by a civil action for damages. Had his private interest alone been involved it is doubtful whether this Court would ever have relaxed the old common law rule followed as late as *Adams* v. *New York*, 192 U. S. 585. It is reasonable to suppose that the basic reason for the present rule, first announced in *Weeks* v. *United States*, 232 U. S. 383, was the public interest in securing enforcement of the constitutional guarantee embodied in the Fourth Amendment. For, as Mr. Justice Bradley there said (p. 393):

> "The efforts of the courts and their officials to bring the guilty to punishment, praiseworthy as they are, are not to be aided by the sacrifice of those great principles established by years of endeavor and suffering which have resulted in their embodiment in the fundamental law of the land."

And, as Mr. Justice Holmes, dissenting, said in the *Olmstead* case, 277 U. S. at 470:

> "We have to choose, and for my part I think it is less evil that some criminals should escape than that the government should play an ignoble part."

(2) Whatever may be the proper rule with respect to the Fourth Amendment, we believe that there is no room for doubt as to what Congress intended in enacting the Communications Act. As Mr. Justice Roberts said in construing the Act in the first *Nardone* case (302 U. S. at 383):

> "Congress may have thought it less important that some offenders should go unwhipped of justice than that officers should resort to methods deemed inconsistent with ethical standards and destructive of personal liberty."

This view was reaffirmed in the second *Nardone* case. This Court has thus interpreted the purpose of the Act as going far beyond the mere remedying of wrongs done to particular persons. The purpose of the statute is to protect the people at large against iniquitous practices.

In support of its contention that the statute has purely a remedial purpose, the Government relies (Br. p. 48) upon the fact that the statute prohibits interception and divulgence only when those acts are not "authorized by the sender". We believe that that phrase is in no way inconsistent with the broader construction which this Court has heretofore adopted. Interception and divulgence of telephone messages without the knowledge and consent of the senders, is an iniquitous practice, but the practice is in no sense improper if both parties to the conversation consent. Hence, the statute has prohibited the practice

only where no such consent exists. The phrase in Section 605 with respect to the sender's consent therefore does not mean that only the sender may complain of the wrong. It means rather that the absence of consent is a prerequisite to the existence of the wrong. Once the wrong exists, the statute condemns it unequivocally and without qualification.

The Government also argues (Br. pp. 49-50) that the rule must be the same under the Communications Act as under the Fourth Amendment, because judicial construction having read into the Amendment a prohibition against the introduction of illegally seized evidence, the same meaning should be given to the express prohibition contained in the statute. But we are not dealing here with any such simple problem. As already pointed out, this Court may be of the opinion that the objective in prohibiting the introduction of evidence illegally seized in violation of the Fourth Amendment is satisfied by restricting the right to object to the owner or possessor of the thing seized. The Congress, however, has not so restricted the prohibition of the Communications Act. On the contrary, it has absolutely prohibited the divulgence of any illegally intercepted message. There can hardly be doubt that an attempt to place in evidence such a message itself, though against a person not involved in the conversation, would be considered a violation of the statute, and thus be banned. And, if a third person could object to this violation of the "divulgence" part of the statute, he should have the same standing to object to a violation of the "use" portion of the same statute. For there is no difference in this respect in the statute between the language dealing with the prohibition against divulgence and that dealing with the prohibition against use.

Finally, the Government contends (Br. p. 50) that this Court has recognized an analogy between Section 605 and

the Fourth Amendment by citing the *Silverthorne* case, 251 U. S. 385, in the course of its opinion in the second *Nardone* case (308 U. S. 338, 340-1). This contention is also unsound. The opinion in the second *Nardone* case reveals that the decision was rested upon the language of the Communications Act, and that the rule under the Fourth Amendment exemplified by the *Silverthorne* case was referred to only by way of illustration. Mr. Justice Frankfurter certainly had the provisions of the Communications Act in mind for he spoke of "direct" and "indirect" uses.

The cases cited by the Government (Br. p. 48) with regard to the privilege against self-incrimination are not in point. All three dealt with attempts by individuals to assert the privilege of a corporation and really rested only on the proposition that a corporation has no such privilege. Indeed, in the *Grant* case (227 U. S. 74) this Court was careful not to say that had the papers involved belonged to the individual client rather than the corporation, Grant could not have urged that their production would have incriminated that client.

CONCLUSION.

It is respectfully submitted, therefore, that in accordance with the views expressed in our main briefs the convictions should be reversed.

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No. 256

In the Supreme Court of the United States

OCTOBER TERM, 1941

DR. MAXIMILIAN GOLDSTEIN, DR. BENJAMIN SCHWARTZ, HERMAN RUBIN AND IRVING ELENTUCH, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

INDEX

	Page
Opinion below	1
Jurisdiction	1
Questions presented	2
Statute involved	3
Statement	3
Argument	10
Conclusion	18

CITATIONS

Cases:

Agnello v. *United States*, 269 U. S. 20 — 14

Allis v. *United States*, 155 U. S. 117 — 17, 18

Belcher v. *United States*, 50 F. (2d) 573 — 14

Creech v. *United States*, 97 F. (2d) 390 — 14

Goldman v. *United States*, 118 F. (2d) 310, certiorari denied June 2, 1941, Nos. 962, 963, 980, October Term, 1940 — 6

Hale v. *Henkel*, 201 U. S. 43 — 14

Ingram v. *United States*, 113 F. (2d) 966 — 14

Lewis v. *United States*, 92 F. (2d) 952 — 14

Nardone v. *United States*, 302 U. S. 379 — 16

Nardone v. *United States*, 308 U. S. 338 — 11, 12, 13

Olmstead v. *United States*, 277 U. S. 438 — 16

Quercia v. *United States*, 289 U. S. 466 — 17

Shore v. *United States*, 49 F. (2d) 519, certiorari denied, 283 U. S. 865 — 14

Silverthorne Lumber Co. v. *United States*, 251 U. S. 385 — 15

United States v. *Murdock*, 290 U. S. 389 — 17

United States v. *Muscarelle*, 63 F. (2d) 806, certiorari dehied, 290 U. S. 642 — 14

United States v. *Socony-Vacuum Oil Co.*, 310 U. S. 150 — 11, 18

United States v. *Weiss*, 34 F. Supp. 99 — 4

Weiss v. *United States*, 308 U. S. 321 — 4, 7, 16

Whitcombe v. *United States*, 90 F. (2d) 290, certiorari denied, 302 U. S. 759 — 14

Statutes involved:

Sec. 605 of the Federal Communications Act of June 19, 1934, c. 652, 48 Stat. 1064 (47 U. S. C. § 605) — 3

407019—41——1

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OPINION BELOW

The opinion of the Circuit Court of Appeals (R. 5256–5270) is reported at 120 F. (2d) 485.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered June 18, 1941 (R. 5271). The petition for a writ of certiorari was filed on July 11, 1941. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925. See

also Rule XI of Rules of Practice and Procedure in Criminal Cases, promulgated by this Court May 7, 1934.

QUESTIONS PRESENTED

1. Whether the trial court in the preliminary hearing accorded the petitioners a fair opportunity to prove that a substantial portion of the Government's evidence was derived from illegal interception of telephone communications.

2. Whether the trial court applied the correct rule as to the burden of proof in holding that the Government's evidence was not derived from illegally intercepted telephone communications.

3. If the trial court did not apply the correct rule as to the burden of proof, whether the petitioners, not being parties to any of the intercepted telephone communications, may complain of the admission against them of evidence procured as a result of such interception.[1]

4. Whether the trial court's instructions deprived the petitioners of a fair trial by emphasizing the evidence of the prosecution or by intimating its views on factual issues submitted to the jury.

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[1] The petition states (Pet. 8), on the basis of evidence outside the record, that petitioners Goldstein and Rubin were parties to eight and fifteen intercepted telephone communications, respectively, but submits the case upon the assumption stated in question 3 above. See footnote on page 8 of the Petition, and Questions I and II at pages 13 and 14 of the Petition.

STATUTE INVOLVED

Section 605 of the Federal Communications Act of June 19, 1934, c. 652, 48 Stat. 1064, 1103 (47 U. S. C., sec. 605), provides, in part, as follows:

> No person receiving or assisting in receiving, or transmitting, or assisting in transmitting, any interstate or foreign communication by wire or radio shall divulge or publish the existence, contents, substance, purport, effect, or meaning thereof * * * and no person not being authorized by the sender shall intercept any communication and divulge or publish the existence, contents, substance, purport, effect, or meaning of such intercepted communication to any person * * * and no person having received such intercepted communication or having become acquainted with the contents, substance, purport, effect, or meaning of the same or any part thereof, knowing that such information was so obtained, shall divulge or publish the existence, contents, substance, purport, effect, or meaning of the same or any part thereof, or use the same or any information therein contained for his own benefit or for the benefit of another not entitled thereto * * *.

STATEMENT

In a thirty-count indictment returned March 22, 1940, in the United States District Court for the Southern District of New York, petitioners and six others were charged with using the United

States mails in the execution of a scheme to defraud (Sec. 215 of the Criminal Code, 18 U. S. C. § 338) and, in the thirtieth count, with conspiracy to commit the substantive offenses (Sec. 37 of the Criminal Code, 18 U. S. C. § 88) (R. 6–75). In essence, the scheme charged was the same as that which was before this Court in *Weiss* v. *United States*, 308 U. S. 321; that is, an elaborate plot, participated in by lawyers, doctors, "runners," and insurance policy holders, to defraud insurance companies by inducing them to pay false claims for simulated disabilities.[2] Defendant Joseph Garrow, charged as a member of the law firm which supervised the present conspiracy (R. 9–10), pleaded guilty prior to trial (R. 85).

[2] The Weiss conspiracy was directed by the law firm of J. J. and A. L. Weiss; the present case involves a competing ring under the direction of the law firm of Garrow and Garrow (R. 9, 623–624) which employed some of the same doctors and "runners." Thus, Drs. Goldstein and Messman, who were named as defendants in the *Weiss* case, are in the present case a defendant and co-conspirator, respectively (R. 6). It may be noted that on remand following the reversal of the convictions in the *Weiss* case the trial court, on motion of the defendants, conducted a preliminary inquiry into the sources of the Government's evidence in that case and concluded that the Government could avail itself of the testimony of Messman and others, despite the use of wire tapping. *United States* v. *Weiss*, 34 F. Supp. 99 (S. D. N. Y.). Thereupon all the defendants in the *Weiss* case, except petitioner Goldstein, pleaded guilty (Pet. 3). Much of the evidence in the preliminary hearing of the present case was incorporated by stipulation from this earlier hearing in the *Weiss* case (R. 114, 117 *et seq.*).

There was a severance as to two other defendants (R. 88). A fourth defendant pleaded guilty during the trial (R. 88). The remaining six defendants were convicted by the jury on various counts of the indictment, but only four have appealed (R. 91). Petitioners were sentenced as follows: Goldstein, fifteen months; Schwartz, one year and a day; Rubin, six months; and Elentuch, two months (R. 92). The convictions were affirmed by the Circuit Court of Appeals for the Second Circuit (R. 5271).

The sufficiency of the evidence introduced at the trial is not challenged, and the case turns largely upon the admissibility of the testimony of Messman and Garrow, who, it is alleged, were induced to confess and testify for the Government by being confronted with records of unlawful interceptions of their telephone messages. Petitioners also charge that the testimony of Messman and Garrow was strengthened and their recollection refreshed by the use of records of intercepted telephone communications to which the witnesses were parties (Pet. 4, 5–7). A preliminary hearing was held to investigate these charges and the evidence introduced at that hearing tended to establish the following facts:

In the early summer of 1936, two law firms were retained by a group of insurance companies to investigate disability frauds (R. 167, 187–188). One Harry Kipnis, who had been a

fraudulent claimant as well as a solicitor of fraudulent claims, first for the Weiss firm and later for the Garrow firm (R. 623–624, 638), made a confession to the insurance attorneys, implicating petitioner Goldstein, defendant Garrow, Dr. Messman, the Weisses, and others (R. 623–634). With the consent of Kipnis and another informer, Friedman, a concealed microphone was installed in each of their offices, by means of which conversations were overheard and recorded.[3] Telephone extension lines were also installed enabling employees of the insurance company to overhear telephone conversations between the informants and various members of the conspiracy (R. 186–187, 193–200, 234, 264–272, Gov. Exs. 8, 9, 10, 11, 17; Def. Exs. C to L, inclusive, in the preliminary hearing). However, the participation of the petitioners in the fraudulent scheme was known from Kipnis' statements prior to this arrangement, which was made solely to corroborate Kipnis' story (R. 218, 461, 466–467).

In November, 1936, the insurance companies turned over to the United States Attorney all the material they had gathered up to that point, including Kipnis' confession, a series of case histories which Kipnis had prepared covering fraud-

[3] No question is raised as to the admissibility of this type of evidence. See *Goldman* v. *United States*, 118 F. (2d) 310 (C. C. A. 2), certiorari denied June 2, 1941, Nos. 962, 963, 980, October Term, 1940.

ulent claims other than his own, daily reports by the informers covering their activities in the course of the investigation, the insurance company files in the suspect cases, and recordings and transcripts of the conversations overheard in the offices of Kipnis and Friedman[1] (R. 156–158, 621–685, 727–729). The United States Attorney assigned a post-office inspector to review this material (R. 152–153, 156–158). Early in December the inspector reported that the evidence then on hand warranted the indictment of 75 persons (R. 287), and recommended that prosecution should proceed "without any further investigation" (R. 158). The United States Attorney, however, determined to install taps on the telephone wires serving Messman's office, the Weiss and Garrow law offices, and J. J. Weiss' home, in order to obtain further corroboration (R. 258–259, 303–304, 311–312, 688). No investigation was made of leads or clues derived from these intercepted communications; the records and transcripts were merely filed away for future use in preparation for trial (R. 314, 338–339, 688–689, 809).

Upon his arrest on May 18, 1937, Messman was lodged in a cell with Nelson, a co-conspirator, who

[1] The report contained only one reference to a telephone conversation overheard in the informers' offices. This was a conversation relating to the *Weiss* case, not to the Garrow conspiracy, and its substance had previously been reported by Kipnis (R. 252–256, Def. Ex. H, Gov. Ex. 1).

told him that the Government "had all kinds of evidence against all of us," including wire taps (R. 428–431, 514–519). Later the same day Messman was questioned in the United States Attorney's office, where he was also told of the wire tapping (R. 519, 432–433, 519, 538). Messman offered to "break the entire racket wide open" if the United States Attorney would promise leniency (R. 434). He was told that the prosecutors "could make no promises," but that "we will do what we can to help you out"; on the following morning he made a full confession (R. 483–484, 521, 689–691). Thereafter he devoted a considerable amount of time to assisting in the preparation of the case and was placed on the Government pay roll at a salary varying from $65 to $100 a week, continuing down to the date of the preliminary hearing (R. 231, 485, 509–510).

Messman testified that the references to wire tapping in his conversations with Nelson and the Assistant United States Attorneys had nothing to do with his determination to confess (R. 520, 540, 542, 552); that he had realized the inevitability of detection as far back as September 1936 (R. 519–520) when information as to Kipnis' activities as an informer came to Weiss' attention (R. 896–898); that he had thought of confessing two weeks prior to the arrest (R. 519); that he had seen Kipnis at police headquarters at the time of his arrest and connected his presence with the incidents of Sep-

tember 1936 (R. 549); that he had actually made up his mind to confess when he entered the room to be interviewed by the Assistant United States Attorneys (R. 545, 552), but that he had delayed in order to "size up" his interviewers and to try to better his position (R. 540, 545, 550).

Four months after Messman's confession, when the Government was preparing to try the *Weiss* case, a number of the records of intercepted telephone conversations were, for the first time, played to Messman and he identified them and initialed corrected transcripts (R. 351–352, 356–357, 485–486, 523). But Messman testified that he recalled the substance of these conversations independently and that the records, transcripts, and references thereto in the Government trial brief, which he reviewed prior to the Weiss trial, merely refreshed his recollection of such matters as dates and exact wording (R. 494, 513, 524–535). Messman was instructed not to use the wire taps in any manner in preparing to testify in the present case, and they were not used (R. 366, 368, 472–473).

Elias Garrow, brother and law partner of defendant Joseph Garrow, was among those arrested on May 18, 1937 (R. 403). When interviewed by the Assistant United States Attorneys he claimed his privilege against self-incrimination, and they did not mention wire tapping (R. 341, 403, Def. Ex. CC in the preliminary hearing). He had no further talks with representatives of the United States

Attorney until after he pleaded guilty to one of the insurance fraud indictments on April 20, 1939 (R. 403). He testified at the preliminary hearing that he knew from newspapers and conversations with J. J. Weiss that the Government had tapped the wires of the conspirators, including his own, but he believed that none of his conversations which the Government might have overheard were incriminating (R. 415–417), and they had nothing to do with his decision to plead guilty (R. 408, 412–413, 418).

ARGUMENT

I

Petitioners complain that the preliminary hearing was unfair because the trial judge improperly limited cross-examination and refused to permit them to inspect certain documents embodying parts of the Government's evidence (Pet. 9–10, 27–28).

A. The so-called cross-examination occurred during defense counsel's questioning of the post-office inspector and the insurance company attorney, who were called *by the defense* (R. 126, 153, 175, 180). If the fact that these witnesses were associated with the prosecution justified some relaxation of the rules governing direct examination, it was nevertheless within the discretion of the court to exert a restraining influence upon the tendency of defense counsel to lead the witnesses and to attempt to discredit answers previously

given. Defense counsel recognized this by acquiescing in each instance to the ruling of the court, in three of the four cases expressly withdrawing the objectionable questions.

B. It was entirely proper for the trial court to refuse defense counsel access to the whole of such documents as the post office inspector's report, which summarized all the evidence submitted to the United States Attorney by the insurance companies (R. 153–154, 156–158, 292–293); the transcript of Messman's interview of May 18, 1937, and his confession of May 19, 1937 (R. 316–317, 323, 327); the transcript of the Garrow interview of May 18, 1937 (R. 339–340); and the original trial brief covering Messman's testimony in the Weiss trial (R. 369–370). In each case, as petitioners concede (Pet. 9), the trial court, after examining the document, made available such portions as expressly related to wire tapping. Clearly, anything more would have compelled the Government to disclose the bulk of its evidence prior to trial. Cf. *Nardone* v. *United States*, 308 U. S. 338, 342.

It may, of course, be inconvenient to the defense that it must, in the first instance, accept the trial court's judgment as to what portions of a relevant document may be examined.[3] But that in-

[3] Cf. *United States* v. *Socony-Vacuum Oil Co.*, 310 U. S. 150, 233–234, where this Court said that it was within the sound discretion of the trial court whether grand jury minutes used to refresh witnesses' recollection should be shown to defense counsel.

convenience is inevitable under the rules laid down in the *Nardone* case for the conduct of such preliminary hearings; and the hardship in this case was certainly mitigated, if not eliminated, by the trial court's ruling that additional objections at the trial on account of illegal wire tapping would not be foreclosed by the preliminary hearing (R. 478, 615). Under this ruling defense counsel had the opportunity to judge for themselves as the testimony unfolded during the trial whether to pursue further the inquiry begun in the preliminary hearing. From their failure to do so it may reasonably be inferred that the evidence revealed at the trial lent no additional support to the charge that the Government's case rested on wire tapping.

II

A decision of the question whether petitioners have standing to complain of the interceptions is not essential to the affirmance of their convictions. The Circuit Court of Appeals reached that question only because it concluded—erroneously, we believe—that the district court had imposed the burden of proof in the preliminary hearing upon the defendants rather than upon the Government. 120 F. (2d) at 488. We believe that the trial court applied the correct rule as to burden of proof and that its rulings (R. 613–614, 962, 2110, 5081–5082) permitting Messman and Garrow to testify constitute a finding that the Government had

proved that considerations other than wire tapping brought about the determination of these defendants to confess and testify.

The Circuit Court of Appeals overlooked the fact that the Government expressly conceded at the preliminary hearing that the defense had carried its burden of establishing a *prima facie* case under the *Nardone* decision, and that the burden had passed to the Government (R. 819–820, 821–822). In the face of this concession, there is no basis whatever for the conclusion that the trial court nevertheless imposed the burden upon the defendants or was under any misapprehension as to the applicable rule. Moreover, petitioners at no time took issue with the trial court or Government counsel on the burden of proof (cf. R. 324–326, 348), so that the Circuit Court of Appeals had to go outside the assignments of error, briefs, and arguments below to consider that question.

If, as we believe clear, the trial court applied the proper rule as to burden of proof and, with fair basis in the evidence, found that the Government had established that its proof had an origin independent of wire tapping,[9] the further question whether petitioners have standing to

[9] See summary of the evidence in the Statement, *supra*, pp. 5–10. The Circuit Court of Appeals conceded that this evidence would have been sufficient to sustain an express finding that the "'taps' contributed nothing" to the breakdown of Messman. 120 F. (2d) at 488.

complain of any wire tapping which did take place is not presented. But even if that question be considered, the Circuit Court of Appeals was clearly correct in ruling that persons who are not parties to intercepted telephone communications have no standing to complain of the introduction of testimony procured as a result of such interceptions. We can here add little to the careful analysis in the opinion below showing, by analogy to decisions under the Fourth Amendment,[7] that the right of privacy conferred by Section 605 of the Federal Communications Act may be invoked only by the "sender" of the communication. 120 F. (2d) at 489–490.

Petitioners argue that the analogy is imperfect because Section 605 expressly forbids "use" as well as acquisition of certain evidence, whereas it is only by "judicial decisions" that the Fourth Amendment forbids use of evidence acquired by unlawful search or seizure (Pet. 22–23). See,

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[7] Under the search and seizure clause, only the owner or lawful tenant of the premises searched may question the legality of the search. *Lewis* v. *United States*, 92 F. (2d) 952 (C. C. A. 10); *United States* v. *Muscarelle*, 63 F. (2d) 806 (C. C. A. 2), certiorari denied, 290 U. S. 642; *Whitcombe* v. *United States*, 90 F. (2d) 290 (C. C. A. 3), certiorari denied, 302 U. S. 759; *Belcher* v. *United States*, 90 F. (2d) 573 (C. C. A. 8); *Shore* v. *United States*, 49 F. (2d) 519 (App. D. C.), certiorari denied, 283 U. S. 865; *Ingram* v. *United States*, 113 F. (2d) 966 (C. C. A. 9); *Creech* v. *United States*, 97 F. (2d) 390 (C. C. A. 5). Cf. *Agnello* v. *United States*, 269 U. S. 20, 35; *Hale* v. *Henkel*, 201 U. S. 43, 69, 70.

e. g., *Silverthorne Lumber Co. v. United States*, 251 U. S. 385, 392. Such a distinction is wholly without substance. The Fourth Amendment, as judicially construed, forbids "use" of illegally acquired evidence; yet the federal courts have uniformly declined to hear objections to such "use" when asserted by persons who were not owners or tenants of the premises illegally searched. There is no reason why a comparable statutory inhibition should require or be given more drastic sanction.

Petitioners also cite (Pet. 20–21) the *Weiss* case as supporting the proposition that any defendant may raise the question, even though his wires have not been tapped, because in that case Goldstein's conviction was reversed, although none of his calls were intercepted.[8] The opinion is silent on the reasons for reversal as to Goldstein, but in that case the actual intercepted messages were introduced and three of the four petitioners were, as parties to the messages, affirmatively entitled to their exclusion from evidence. Where the intercepted messages themselves are offered, a judge may, perhaps, intervene upon his own motion to prevent the overt perpetration in court of the offense of divulging an intercepted communication, especially where some of the parties before him have a personal interest in the exclusion of the

[8] Brief of United States, No. 42, October Term, 1939, pp. 9, 40–41.

messages. Cf. Mr. Justice Brandeis' dissenting opinion in *Olmstead* v. *United States*, 277 U. S. 438 at 480 and 485. It is quite another matter to accord an accused, whose rights have not been invaded, the power to inaugurate elaborate collateral inquiries into possible violations of the statutory immunities of other persons. In any event, in view of the absence of discussion of the point in the *Weiss* opinion, the decision in that case as to Goldstein plainly cannot be regarded as sustaining the novel and far-reaching doctrine urged by petitioners here.[9]

Finally, petitioners argue that the holding of the court below leaves open the possibility of introducing at the trial of A and B intercepted messages of A against B and intercepted messages of B against A (Pet. 24). This argument assumes without warrant that enforcement agencies will continue to intercept and divulge telephone communications in violation of Section 605 as construed by this Court in the first *Nardone* case, 302 U. S. 379, and in *Weiss* v. *United States*, 308 U. S. 321.

III

Petitioners complain that the trial court's charge to the jury prejudiced their rights by

[9] The opinion below suggests as an alternative ground for affirmance that section 605 "prohibits only the divulging of the message, not its use after it has been divulged." 120 F. (2d) at 490. We agree with petitioners (Pet. 25–26), however, that it is difficult to reconcile this view with the express terms of the statute prohibiting the "use" of such information.

emphasizing the prosecution's evidence and by intimating through a series of rhetorical questions its own views on issues which were to be decided by the jury (Pet. 11–13, 28–29).

We submit that the charge when read in its entirety is eminently fair. It is well settled that a trial court need not recapitulate all the items of evidence (*Allis* v. *United States*, 155 U. S. 117, 124), and that a federal judge may comment on the evidence so long as the factual issues in the case are fairly submitted to the jury for its determination. See *Quercia* v. *United States*, 289 U. S. 466, 469; *United States* v. *Murdock*, 290 U. S. 389, 394. This was certainly done in the present case, and the judge emphasized that it was the duty of the jury to disregard any opinions which he might inadvertently express (R. 5124, 5130–5135, 5137, 5145–5146, 5155, 5156). The "rhetorical questions" referred to merely presented appropriate issues for the jury's consideration. If the questions seemed to permit of but one answer, it was only because the evidence of guilt was overwhelming. Moreover, only a single specific complaint of undue stressing of the prosecution's testimony was made when the trial court invited exceptions to the charge, and, when the judge explained the remarks objected to, counsel, apparently satisfied, dropped the matter (R. 5161–5162, cf. 5167–5168). The criticism now directed at the trial court's instructions must be weighed in the light of the complaisance of defense counsel at the time the instruc-

tions were given. Cf. *Ellis* v. *United States*, *supra*, at 122; *United States* v. *Socony-Vacuum Oil Co.*, 310 U. S. 150, 238–239.

CONCLUSION

The scope of the prohibition against wire tapping has been fully defined in this Court's decisions in the *Nardone* and *Weiss* cases, so that the problem presented in the instant case is not likely to arise again. The petitioners' guilt under the evidence is not disputed. The issue whether that evidence was unlawfully procured was investigated in a fairly conducted preliminary hearing and decided against petitioners. There is, therefore, no occasion for further review of the case by this Court. The petition for a writ of certiorari should be denied.

Respectfully submitted.

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No. 256

In the Supreme Court of the United States

OCTOBER TERM, 1941

DR. MAXIMILIAN GOLDSTEIN, DR. BENJAMIN SCHWARTZ, HERMAN RUBIN, AND IRVING ELENTUCH, PETITIONERS

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES

INDEX

	Page
Opinion below	1
Jurisdiction	1
Questions presented	2
Statute involved	3
Statement	4
Summary of argument	9
Argument	14
I. The trial court correctly found, upon substantial evidence, that the Government's proof, including the testimony of Messman and Garrow, was not obtained through the use of wire tapping	14
A. The Government proved that its information as to the conspiracy and petitioners' involvement therein was obtained from sources other than wire tapping	18
B. The evidence was sufficient to support the trial court's findings that the use of wire tapping did not induce Messman or Garrow to testify for the Government and did not aid their testimony	23
II. The trial court placed no unfair restrictions upon petitioners at the preliminary hearing	32
III. The testimony of Messman and Garrow was not inadmissible under Section 605 of the Federal Communications Act even if information of the fact that the Government had evidence against them obtained by illegal wire tapping entered into their decision to confess and testify	38
IV. Since petitioners were not parties to the intercepted communications, they have no standing to object to the introduction of evidence obtained thereby	45
V. The trial court's charge to the jury was not unfair or prejudicial	50
Conclusion	55

CITATIONS

Cases:	
Agnello v. *United States*, 269 U. S. 20	47
Allis v. *United States*, 155 U. S. 117	53
Arnstein v. *United States*, 296 Fed. 946, certiorari denied, 264 U. S. 595	35
Belcher v. *United States*, 50 F. (2d) 573	46

436991—42——1

Cases—Continued. Page

Belote v. *State*, 36 Miss. 96 44
Bishop Atterbury's Trial, 16 How. St. Tr. 490 45
Boyd v. *United States*, 116 U. S. 616 47
Bryant v. *State*, 131 Tex. Cr. R. 274 45
Collins v. *State*, 169 Tenn. 393 45
Connally v. *Medalie*, 58 F. (2d) 629 ..... 46, 49
Coon v. *United States*, 36F. (2d) 164 46
Creech v. *United States*, 97 F. (2d) 390 46
Duffy v. *People*, 26 N. Y. 588 44
Dupuis v. *State*, 14 Ohio App. 67 44
Gouled v. *United States*, 255 U. S. 298 47
Grant v. *United States*, 227 U. S. 74 48
Hale v. *Henkel*, 201 U. S. 43 48
Hester v. *United States*, 265 U. S. 57 46
Horning v. *District of Columbia*, 254 U. S. 135 52
Ingram v. *United States*, 113 F. (2d) 966 46
Jones v. *State*, 75 Ga. 825 44
Jordan v. *Lewis*, 2 Stra. 1122, 14 East 306 45
Lewis v. *State*, 220 Ala. 461 44
MacDaniel v. *United States*, 294 Fed. 769, certiorari denied, 264 U. S. 593 46
McQueen v. *Commonwealth*, 196 Ky. 227 44
Morgan v. *Halberstadt*, 60 Fed. 592 48
Nardone v. *United States*, 302 U. S. 379 38
Nardone v. *United States*, 308 U. S. 338 ..... 5, 12, 13, 14, 17, 27, 33, 37, 39, 40, 42, 46
Olmstead v. *United States*, 277 U. S. 438 46
Osborn v. *People*, 83 Colo. 4 44
People v. *Ascey*, 304 Ill. 404 44
People v. *Defore*, 242 N. Y. 13, certiorari denied, 270 U. S. 657 46
Quarles and Butler, In re, 158 U. S. 532 35
Quercia v. *United States*, 289 U. S. 466 ..... 52, 54
Remus v. *United States*, 291 Fed. 501, certiorari denied, 263 U. S. 717 46
Shore v. *United States*, 49 F. (2d) 519, certiorari denied, 283 U. S. 865 46
Shufflin v. *State*, 122 Ark. 606 44
Silverthorne Lumber Co. v. *United States*, 251 U. S. 385 50
Smith v. *State*, 166 Miss. 893 45
State v. *Cocklin*, 109 Vt. 207 45
State v. *Dixson*, 80 Mont. 181 44
State v. *Moran*, 131 Ia. 645 44
State v. *Motley*, 7 Rich. Law 327 (S. C.) 45
State v. *Riddle and Huffman*, 205 N. C. 591 44

Cases—Continued. Page

State v. *Simpson*, 157 La. 614 44
State v. *Turner*, 82 Kan. 787 44
United States v. *Frankel*, 65 F. (2d) 285, certiorari denied, 290 U. S. 682 52
United States v. *Garsson*, 291 Fed. 646 35
United States v. *Hunter*, Fed. Cas. No. 15,424 44
United States v. *Molasky*, 118 F. (2d) 128 35
United States v. *Murdock*, 290 U. S. 389 ..... 52, 54, 55
United States v. *Polakoff*, 112 F. (2d) 888, certiorari denied, 311 U. S. 653 48
United States v. *Richard*, Fed. Cas. No. 16,154 44
United States v. *Socony-Vacuum Oil Co.*, 310 U. S. 150 ..... 12, 36, 52
United States v. *Thomson*, 113 F. (2d) 643 50
United States v. *Weiss*, 34 F. Supp. 99 ..... 6, 10, 16, 22, 29
Vogel v. *Gruaz*, 110 U. S. 311 35
Wälrath v. *State*, 8 Neb. 80 44
Weiss v. *United States*, 308 U. S. 321 ..... 5, 13, 28, 39, 49, 50
Whitcombe v. *United States*, 90 F. (2d) 200, certiorari denied, 302 U. S. 759 46
Wilson v. *United States*, 221 U. S. 361 48
Wong Tai v. *United States*, 273 U. S. 77 35

Constitution and Statute:

Federal Communications Act of June 19, 1934, c. 652, 48 Stat. 1064, Sec. 605 (47 U. S. C., Sec. 605) 3

Miscellaneous:

2 Wharton's *Criminal Evidence*, Sec. 600 p. 995 (11th ed., 1935) 44
Wigmore, *Evidence* (3d ed., 1940), Secs. 2196, 2270, 2326 48

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UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the Circuit Court of Appeals (R. 19–31) is reported at 120 F. (2d) 485.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered June 18, 1941 (R. 31). The petition for a writ of certiorari was filed July 11, 1941, and was granted October 13, 1941 (R. 32). The jurisdiction of this Court rests upon Section 240

(a) of the Judicial Code, as amended by the Act of February 13, 1925. See also Rule XI of the of the Criminal Appeals Rules promulgated by this Court May 7, 1934.

QUESTIONS PRESENTED

1. Whether the trial court found that the Government's use of illegal wire tapping did not substantially contribute to the decision of two of its witnesses who were implicated in the conspiracy to testify in its behalf.

2. Whether the trial court in the preliminary hearing accorded petitioners a fair opportunity to prove that a substantial portion of the Government's evidence derived from illegal wire tapping.

3. Whether, even if the Government's use of illegal wire tapping was a contributing factor in influencing the aforementioned witnesses to testify in its behalf, Section 605 of the Federal Communications Act would render their testimony inadmissible against persons with proper standing to object.

4. Whether, if so, petitioners have such standing to object when they were not parties to the telephone communications which were intercepted and when the communications were not introduced or their contents divulged in evidence.

5. Whether the trial judge in his charge to the jury deprived petitioners of a fair trial by emphasizing the Government's evidence or by intimating his views on questions of fact to be decided by the jury.

If the first question is answered in the affirmative, the Court may also wish to determine the question whether the finding of the trial court, together with its conclusion to the effect that all of the Government's evidence was derived from sources other than illegal wire tapping, are supported by evidence, although such question is not raised by petitioners' assignments of error or statements of questions presented and although the court below stated, in effect, that the evidence was sufficient.

STATUTE INVOLVED

Section 605 of the Federal Communications Act of June 19, 1934, c. 652, 48 Stat. 1064, 1103 (47 U. S. C., Sec. 605), provides, in part, as follows:

> No person receiving or assisting in receiving, or transmitting, or assisting in transmitting, any interstate or foreign communication by wire or radio shall divulge or publish the existence, contents, substance, purport, effect, or meaning thereof * * * to any person other than the addressee, his agent, or attorney, * * *; and no person not being authorized by the sender shall intercept any communication and divulge or publish the existence, contents, substance, purport, effect, or meaning of such intercepted communication to any person; * * *; and no person having received such intercepted communication or having become acquainted with the contents, substance, purport, effect, or meaning of the same or any part thereof, knowing that such infor-

mation was so obtained, shall divulge or publish the existence, contents, substance, purport, effect, or meaning of the same or any part thereof, or use the same or any information therein contained for his own benefit or for the benefit of another not entitled thereto * * *.

STATEMENT

On March 22, 1940, a thirty-count indictment was returned in the District Court for the Southern District of New York, charging petitioners and six others in twenty-nine counts with using the United States mails in the execution of a scheme to defraud, in violation of Section 251 of the Criminal Code (18 U. S. C., Sec. 338), and, in the thirtieth count, with conspiracy to commit the substantive offenses, in violation of Section 37 of the Criminal Code (18 U. S. C., Sec. 88) (Tr. 6–75).[1] Six of the defendants were convicted on various counts of the indictment,[2] but only the petitioners appealed to the court below (Tr. 91, 93). Petitioners were sentenced as follows: Goldstein, fifteen months; Schwartz, one

[1] Petitioners were granted leave to proceed herein in *forma pauperis* (R. 31–32). The reference Tr. is used to indicate pages of the typewritten transcript; the letter R. refers to the printed portion of the record.

[2] Defendant Joseph Garrow, charged as a member of the law firm which directed the present conspiracy (Tr. 9–10), pleaded guilty prior to trial (Tr. 85). There was a severance as to two other defendants (Tr. 88) and a fourth defendant pleaded guilty during the trial (*ibid.*).

year and a day; Rubin, six months; and Elentuch, two months (Tr. 92). The court below affirmed the judgments (R. 31).

The scheme alleged in the indictment was, in its essentials, parallel to that which was before this Court in *Weiss* v. *United States*, 308 U. S. 321; that is, an elaborately articulated plot, participated in by lawyers, doctors, "runners," and insurance policyholders, to defraud insurance companies by inducing them, by means of fraudulent representations, to pay false claims for simulated disabilities.

The conspiracy in the *Weiss* case centered about and was directed by the law firm of J. J. and A. L. Weiss. That in the instant case operated under the direction of the law firm of Garrow and Garrow, which employed some of the same doctors and "runners." Petitioner Goldstein and another doctor, Messman, a co-conspirator who confessed and testified in behalf of the Government in the present case, were among the defendants in the *Weiss* case.

The sufficiency of the evidence introduced at the trial is not challenged here. The main issue is as to the admissibility of testimony allegedly obtained through the illegal use of wire tapping. When the *Weiss* case was remanded following the reversal of the convictions by this Court, the trial court, upon motion of the defendants in that case and pursuant to *Nardone* v. *United States*, 308

U. S. 338, conducted a preliminary inquiry into the sources of the Government's evidence. Upon the basis of the evidence adduced at that hearing, including testimony by Messman, the trial court concluded that Messman and other witnesses had not been induced to confess and testify for the Government by being confronted with reproductions of intercepted telephone communications or by learning that the Government had such, and that their memories had not been refreshed by such reproductions. The court accordingly held that the Government could avail itself of their testimony. *United States* v. *Weiss*, 34 F. Supp. 99 (S. D. N. Y.). Thereupon all the defendants in that case except Goldstein pleaded guilty (see Goldstein Br. 6). The Government then abandoned the *Weiss* case and moved the trial of the indictment in the instant case (see *id.*, pp. 6–7).

Prior to the trial in the present case petitioners and the other defendants applied to the district court for an order, *inter alia*, suppressing records and transcripts of intercepted telephone messages, evidence obtained by the use of such messages, and the testimony of all witnesses whose recollections were refreshed or whose testimony was in any wise aided by such messages, or resulted from information derived therefrom (Tr. 103–114). The application also sought to have the indictment dismissed in the event that it should be proved to have been based on evidence illegally

obtained. (Tr. 108). An extended preliminary hearing was held before the same judge who had sat at the similar hearing in the *Weiss* case. The main issue, it developed, concerned the prospective testimony of co-conspirators Messman and Elias Garrow, who, it was contended, had confessed and agreed to testify for the Government as a result of being confronted with records of intercepted messages. Much of the evidence introduced was incorporated by stipulation from the *Weiss* hearing and was reread in open court at the preliminary hearing in this case. (See Tr. 114–115, 117–273, 428–458, 483–593, 616–906.) The pertinent facts revealed by this and the other evidence adduced are set forth in Point I of the Argument (*infra*, pp. 18–31).

At the close of the preliminary hearing the court ordered that all records and transcripts of intercepted messages be suppressed together with "all evidence obtained by the United States as a result of intercepted messages" (Tr. 613–614). However, it refused to dismiss the indictment and denied that part of the motion which requested the suppression of the testimony of witnesses whose recollections had been refreshed or whose testimoney had been in any wise aided by intercepted messages; it reserved for specific rulings at the trial final decision as to that part of the motion which requested the suppression of testimony resulting from information derived from such mes-

sages (Tr. 595, 614–615). It ruled that further objections at the trial based on wire tapping would not be foreclosed (Tr. 478, 593–594, 615).

Thereafter the trial was held before a jury. Over the objections of petitioners, the court permitted the Government to call Messman and Garrow, and they testified (Tr. 962, 2110). Motions subsequently made to strike their testimony were denied (Tr. 5081–5082). None of the records or transcripts obtained by wire tapping was introduced in evidence, nor did Messman or Garrow or any other of the numerous witnesses testify as to the existence or contents of any intercepted communication.

Upon appeal from the convictions the court below found nothing in the record to contradict the testimony of the Government agents who prepared the case that the wire tapping had not furnished clues used in preparing the case (R. 22). The court also concluded that the convictions could not stand if either Messman or Garrow should not have been permitted to testify (R. 22). Upon its own construction, it concluded further that the trial court did not find that the use of wire tapping had not been instrumental in inducing Messman and Garrow to testify for the Government, but meant to find merely that the accused had not proved the contrary (R. 22–24). It held, however, that since petitioners were not parties to any of the intercepted telephone communications, they had no standing under Sec-

tion 605 of the Federal Communications Act to object to their divulgence (R. 24–28). Alternatively, the court held that the convictions should also be sustained because, in any event, Section 605 prohibits only the divulgence of intercepted communications, not the introduction in court against third persons of evidence procured through a past divulgence of them (R. 28). The court held, in addition, that the defendants' right of examination had not been limited unduly at the preliminary hearing (R. 30), and that the judge's charge to the jury at the trial was not improper (R. 29–30).

SUMMARY OF ARGUMENT

I

None of the illegally intercepted communications was introduced in evidence and none led to any clues which the Government used in preparing the case or in establishing its proof. Accordingly, if there was any causal relationship between the Government's evidence and the intercepted communications, it must be found in the testimony of Messman or Garrow. The court below said that it would not have disturbed a finding that there was no such causal connection, if such a finding had been made. It held, however, that the trial court meant to find no more than that the accused had failed to prove the existence of such a connection, whereas the burden was on the Government to establish the absence thereof.

No ruling or remark of the trial judge was or is now cited in support of this interpretation of what he found. His rulings permitting Messman and Garrow to testify notwithstanding that he had granted that portion of petitioners' motion which sought to suppress "all evidence obtained by the United States as a result of the use by it of said intercepted messages" are consistent only with a finding that their knowledge of the wire tapping had not motivated them to turn state's evidence. Moreover, in denying that portion of the motion which sought to suppress the testimony of witnesses whose recollection was refreshed or whose testimony was aided by the intercepted messages, the trial court said that it did so upon the grounds stated in its memorandum opinion in the *Weiss* case, 34 F. Supp. 99, 101. In that opinion the court found, in substance, that Messman and others who turned state's evidence were induced to do so by considerations of self-interest free from any influence of wire tapping.

Since the court below was satisfied that the evidence was sufficient to support a finding that the Government's case, including the testimony of Messman and Garrow, was derived from sources independent of illegal wire tapping, and since the trial court so found, this Court may decline any further review of the evidence. Neither in their assignments of error nor statements of questions presented do petitioners raise any question as to the sufficiency of the evidence. In any event, as we show (*infra*, pp. 17–31), the evidence was ample to

support the conclusions both that the Government's information of the conspiracy and petitioners' involvement therein was obtained from sources other than wire tapping, and that the use of wire tapping did not induce Messman or Garrow to testify for the Government and did not refresh their recollections or otherwise aid their testimony.

If the foregoing contentions and the fairness of the preliminary hearing are upheld, no disputed question as to the applicability of Section 605 of the Federal Communications Act is involved or need be determined.

II

Petitioners contend that at the preliminary hearing the trial court denied them a fair opportunity to prove that a substantial portion of the Government's case was derived from wire tapping, in that they were denied opportunity to examine certain documents and were restricted in their right to cross-examine. They complain also that witnesses were permitted to state opinions favorable to the Government. These contentions are without merit.

The documents sought to be examined were investigative reports the disclosure of which would have revealed in advance of trial virtually all the evidence in the Government's possession and perhaps have implicated with criminals persons whom further investigation would show to be innocent. Moreover, the court itself examined the documents

and made available to the defendants those parts having to do with wire tapping. This was a fair and practicable procedure. Cf. *United States* v. *Socony-Vacuum Oil Co.*, 310 U. S. 150, 233–234. The records and transcriptions of the intercepted messages also were available to the defendants and at the trial they had opportunity not availed of to object to any evidence they considered to be tainted.

III

Section 605 of the Federal Communications Act would not render the testimony of Messman and Garrow inadmissible even if information of the fact that the Government had obtained evidence against them by means of wiretapping was a contributing factor in motivating them to turn state's evidence.

If the evidence warrants any inference of a causal relationship between the illegal wire tapping and the testimony of Messman and Garrow, the connection is "so attenuated as to dissipate the taint" and Section 605 is not applicable. *Nardone* v. *United States*, 308 U. S. 338, 341.

Section 605 prohibits the divulgence of the existence, contents, purport, or effect of an illegally intercepted communication, and it prohibits any person knowing of the illegal obtention from using the communication or any information contained in it "for his own benefit or for the benefit of another not entitled thereto." In the present case, there was no divulgence in evidence of the

existence, contents, purport, or effect of any of the illegally intercepted communications or of any facts derived therefrom. And the divulgence to Messman and Garrow of the fact that the Government had wire tapping evidence against them was not a "use" for the "benefit" of anyone within the meaning intended by Congress. This contention is not contrary to any policy shown by the legislative history, and it is not foreclosed by this Court's decisions in the *Weiss* or second *Nardone* case.

IV

As was held by the court below, petitioners, not having been parties to the illegally intercepted communications, are without standing to object to the evidence introduced against them, assuming it to have been contaminated. This constitutes an additional alternative ground for affirmance. Section 605 was designed to protect the sender alone; by its express provisions it is not violated if the sender authorizes the interception. It has long been held that a third party may not object to the introduction against him of evidence obtained in contravention of the Fourth or Fifth Amendments and there are no considerations of policy which would dictate a different result and the imposition of stronger sanctions for violations of Section 605.

V

The court's charge when read as a whole was fair. It left the jury free to form its own con-

clusions and it did not unduly stress the evidence introduced by the Government.

ARGUMENT

I

THE TRIAL COURT CORRECTLY FOUND, UPON SUBSTANTIAL EVIDENCE, THAT THE GOVERNMENT'S PROOF, INCLUDING THE TESTIMONY OF MESSMAN AND GARROW, WAS NOT OBTAINED THROUGH THE USE OF WIRE TAPPING

Throughout the proceedings the Government's position has been that its proof in this case derived from sources independent of wire tapping and hence, apart from other reasons, was not within the prohibition of Section 605 of the Federal Communications Act. See *Nardone* v. *United States*, 308 U. S. 338, 341. Since none of the intercepted messages was put in evidence, they could, in any event, have contributed to the convictions only if they had furnished clues used in the preparation of the case, or if they had served to induce Messman and Elias Garrow to testify, or had had some other derivative relation to the evidence which the Government introduced. The trial court decided that the Government's evidence was not tainted or inadmissible under Section 605 as construed in the second *Nardone* case, and its decision, we submit, was correct. If this be so, no disputed question as to the proper interpretation of Section 605, which we discuss under Points III and IV, *infra*, pp. 38–50, is involved or need be determined.

The court below was satisfied that the illegally intercepted messages had not been used as clues (R. 22), and it said that if the trial judge had affirmatively found that the wire tapping had contributed nothing to the decisions of Messman and Garrow to turn state's evidence, it would not have disturbed the finding (R. 23). It concluded, however, "that it does not appear that the judge meant to find more than that the accused failed to prove that the 'taps' had contributed to the breakdown" (R. 23), whereas in view of the initial showing which, it said, was made by petitioners that taps had been made "and had to some extent been used to break down Messman and to a less degree Garrow," the burden shifted to the Government to prove that the taps had no part, or no substantial part, in achieving that result (R. 23–24). For these reasons it held that if petitioners were entitled to invoke the protection of Section 605, Messman and "probably" Garrow should not have been permitted to testify (R. 24). It further held, however, that petitioners were not so entitled.

The trial court did not find in so many words that wire tapping had played no part in inducing Messman and Garrow to testify. However, the court's rulings and statements are consistent with no other finding. Thus, although the court granted that portion of petitioners' motion which sought to suppress "all evidence obtained by the United States as the result of the use by it of

said intercepted messages" (Tr. 613–614), it permitted Messman and Garrow to testify and it later refused to strike their testimony (Tr. 962, 2110, 5081–5082). Moreover, in denying the immediately following portion of the motion which asked the suppression of the testimony of all witnesses whose recollection was refreshed or whose testimony was in any manner aided by such messages, the court said that it did so "for the reasons stated" in its memorandum opinion in the *Weiss* case (Tr. 614).

As we read that memorandum opinion, the court found, in substance, that Messman and the other witnesses whose decisions to turn state's evidence were there under examination were motivated by considerations of self-interest free from any contaminating influence of wire tapping. 34 F. Supp. 99, 101. Such, too, is the construction placed upon the opinion in the brief (p. 4) for petitioner Schwartz. Accordingly, as is also recognized in that brief (pp. 3–4) and as is not disputed in the briefs for the other petitioners, it is evident that in this case too the trial court was satisfied and in fact found that there was no relation, or at least no substantial relation, between the illicit wire tapping and the testimony of either Messman or Garrow.

The view of the court below that the trial court meant to find no more than that petitioners had failed to prove a causal connection between the

wire tapping and the decisions of Messman and Garrow to testify finds no support in any of the judge's rulings or remarks. None was cited by the court below and none was or is now invoked by petitioners. The error of the view taken by the court below is indicated further by the fact that the petitioners did not urge it. At the hearing there was no disagreement or misunderstanding between the parties or between any of them and the judge as regards the burden of proof at any stage under the procedure outlined by this Court (308 U. S. at 341) in the second *Nardone* case, and it cannot be said that any undue burden was imposed upon the petitioners or that the judge's findings reflect an erroneous notion as to who had the burden. (See Tr. 324–326, 348–349, 624–625, 819–820, 822.)

It seems clear, therefore, that the court below was wrong in concluding that the trial court did not find that the use of wire tapping was not a cause that motivated Messman or Garrow to testify for the Government.

Assuming that the trial court's rulings and statements are to be construed as a finding of no such causal connection, the question arises whether the evidence was sufficient to support it, as well as to support the conclusion of both lower courts that the Government's case was not otherwise tainted. As already noted, the court below agreed that the evidence was sufficient (R. 22, 23). In view of

this fact and of the circumstance that the issue of the sufficiency of the evidence is not raised in petitioners' assignments of error or statements of questions presented, the Court may decline a further review of the evidence. However, in the event that the Court may wish to undertake such a review, we now summarize the facts as shown by the evidence introduced at the preliminary hearing which support the action of the trial court in permitting Messman and Garrow to testify.

A. THE GOVERNMENT PROVED THAT ITS INFORMATION AS TO THE CONSPIRACY AND PETITIONERS' INVOLVEMENT THEREIN WAS OBTAINED FROM SOURCES OTHER THAN WIRE TAPPING.

Early in the summer of 1936 a number of insurance companies retained two New York law firms to investigate fraudulent disability claims (Tr. 167, 187–188). Shortly thereafter one Harry Kipnis confessed to Bernstein, a member of one of these firms, that he had been both a fraudulent claimant and a solicitor of fraudulent claims for the Weiss and Garrow law firms (Tr. 230, 234, 638, 654). He implicated petitioner Goldstein, Dr. Messman, defendant Joseph Garrow, and others (Tr. 288, 623–634, 649–652). Kipnis was then employed to aid in the investigation and was instructed to maintain his contacts with the conspirators (Tr. 234). Thereafter he supplied case histories of frauds in which he had participated (Tr. 634; Ex. 6)[3] and daily written reports con-

[3] The exhibits referred to in this brief are in the series introduced or identified at the preliminary hearing.

cerning the activities of the conspirators (Tr. 657–658). During this same period Bernstein conducted an independent investigation of the insurance companies' files and of their hospital records (Tr. 305, 727–729). In October, Kipnis' oral confession was reduced to writing; as written it covered 52 pages and set forth details as to the fraudulent activities of Messman, Goldstein, J. J. Weiss, and others (Ex. 5; Tr. 280, 623–634, 727).[4]

In order to corroborate details already revealed by Kipnis, the lawyers for the insurance companies had recording machines installed in the offices of Kipnis and Friedman, another informer (Tr. 181–187, 218, 234, 461, 466–467, 617–618). These machines were used to record room conversations and, with the consent of Kipnis and Friedman, were attached to extension receivers and recorded telephone conversations (Tr. 182–187). Cf. *United States* v. *Polakoff*, 112 F. (2d) 888 (C. C. A. 2), certiorari denied, 311 U. S. 653. Any clues or leads which may have been discovered through these recordings were not, however, investigated (Tr. 314, 338, 463). And before either type of recording was made Bernstein had independent evidence as to the entire gamut of the conspiracy and was aware that all four of the petitioners were involved (Tr. 218, 467).

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[4] At the preliminary hearing Dailey, the Government attorney in immediate charge of the case, read into the record significant proof contained in Kipnis' confession and case histories (Tr. 623–683).

In November 1936 the insurance companies made available to the United States attorney all the evidence that had been gathered, including Kipnis' confession and case histories, Kipnis' and Friedman's daily reports, the information gleaned from insurance companies' files and hospital records, and the records of room and telephone conversations. On November 28, 1936, post-office inspector Shea was assigned to examine this material (Tr. 153, 156, 616–619). On December 6 he rendered a report, based solely upon his inspection of the results of the insurance companies' investigation, in which he stated that, in his opinion, a complete mail fraud case existed, and, further, that the evidence on hand warranted the indictment of seventy-five persons "without any further investigation" (Tr. 153, 158, 287, 306). Shea's report contained only one reference to a recorded telephone conversation (Tr. 292–294). This was a conversation between Kipnis and J. J. Weiss, which did not relate to the scheme charged in the present indictment or to any of the petitioners and which in any event merely corroborated facts which had been previously revealed to the Government in one of Kipnis' daily reports (Tr. 253–254, 294–295).

Although Shea and some of the lawyers for the insurance companies believed that no further proof was necessary and that prosecution of the case should not be postponed, and although the

Government attorneys also believed that they had sufficient proof to prosecute the defendants, it was decided to defer action until after the United States Attorney had had an opportunity to confer with the Attorney General concerning the case. It was also decided to secure further corroboration of the proof on hand. (Tr. 258, 303–304, 311–312, 619–620, 626, 688, 809. Cf. Tr. 758–760.)

Pursuant to the United States Attorney's instructions, Shea, assisted by the New York City Police, installed taps on the telephone wires serving Messman's office, the Weiss and Garrow law offices, and J. J. Weiss' home (Tr. 118–119, 159, 688). Telephone conversations thus intercepted during various periods between January 29, 1937, and May 20, 1937, which was two days after the first arrests (see Tr. 101–102), were recorded mechanically or transcribed by stenographers supplied by Bernstein's firm (Tr. 119, 264–270).

The recordings and transcriptions were not given to the insurance companies' attorneys (Tr. 121, 174, 271–272), but were delivered instead to Shea (Tr. 120, 270–271) and he, in turn, delivered them to the United States Attorney's office, where they were filed away (Tr. 121, 160, 313, 387, 689). Shea never heard the recordings (Tr. 125, 160). His investigation was concluded with the submission of his report; he never traced any clues that may have resulted from the wire

taps (Tr. 160). In fact, immediately after he submitted his report, he entered upon other work, returning only to arrange for the interceptions and to collect the recordings (Tr. 289, 159–160). And neither the United States Attorney nor his assistants made any use of the intercepted communications until nearly four months after the arrests when the *Weiss* case was being prepared for trial (Tr. 314, 688–689). At no time did the prosecutors investigate any leads derived from the communications (Tr. 338, 688, 874). The telephone wires were tapped solely for corroborative purposes (Tr. 218–219, 234, 258, 303, 440, 626), and any clues revealed by the taps were regarded as trivial compared with those obtained from other sources (Tr. 339). Moreover, although some of the recordings and transcripts were used in preparing and trying the *Weiss* case, no such use was made of them in the instant case (Tr. 380–381, 366, 368, 472–474).

During the period of the wire tapping, the Government also investigated the insurance companies' files on cases in which the Garrows or Weisses represented the claimants and in which Messman or Goldstein appeared as doctor (Tr. 620–621).

Thus, prior to the time when petitioners or any of the other conspirators were arrested the Government had as sources of evidence the information supplied by the informers, the recordings of

room conversations in their offices, the insurance companies' files, and hospital records (R. 621–622, 727–729). The Government attorney in immediate charge of the case testified that the proof derived from these sources, which had no connection whatever with illicit wire tapping, was alone sufficient to have warranted a prosecution (Tr. 626, 753, 802, 809), and the record contains nothing to contradict his word (see R. 22).

In view of the foregoing facts and of the limited character of petitioners' specific claims, the only remaining question with respect to the sufficiency of the evidence to support the trial court's determination concerns the admissibility of testimony given by Messman and Garrow.

B. THE EVIDENCE WAS SUFFICIENT TO SUPPORT THE TRIAL COURT'S FINDINGS THAT THE USE OF WIRE TAPPING DID NOT INDUCE MESSMAN OR GARROW TO TESTIFY FOR THE GOVERNMENT AND DID NOT AID THEIR TESTIMONY

Petitioners assert that Messman and Elias Garrow were induced to confess and testify for the Government as a result of being confronted with the fact that the Government had intercepted their telephone communications by means of wire tapping. They assert also that the records of these intercepted communications were used to refresh Messman's recollection (Goldstein Br. 9–13; Schwartz Br. 4). The evidence, however, was ample to support the contrary conclusions of the trial court.

Messman

Messman and Garrow, with many others, were arrested on May 18, 1937 (Tr. 428, 403). Messman, by coincidence so far as the record shows (Tr. 329–330), was lodged in a cell with Nelson, a co-conspirator, who had heard a record of a telephone conversation which he had with J. J. Weiss from Messman's office (Tr. 330, 431, 515). Without describing any particular evidence implicating Messman, Nelson told him that the Government "had all kinds of evidence against us," including wire taps (Tr. 431, 514–519, 540). Later the same day Messman was questioned by assistants of the United States Attorney and, although none of the recorded messages was played or described to him (Tr. 315, 328–329, 374, 402, 433, 552), he was apprised of the fact that his and other telephone wires had been tapped (Tr. 319, 432–433, 519, 538).[*] An admitted purpose of the prosecution

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[*] The pertinent portion of the Government attorney's statement to Messman is, in full, as follows (Tr. 319, 537–539):

"That is exactly what we want. I am telling you before we go any further that there is no use of us kidding each other. We have watched your telephone; we have watched all these lawyers' telephones; we have had rooms tapped. We know what is going on. We are not stabbing in the dark. If you want to hear your voice on a record we will be glad to play it. In your instance, Doctor, there is so much to cover. You have been in this for so many years that we feel that in order for you to help yourself, since you are con-

was to induce Messman to plead guilty and testify as a Government witness (Tr. 375, 833, 859–860). Messman offered to "break the entire racket wide open" if the Government attorneys would promise leniency (Tr. 434, 522, 690, 857). He was told that the prosecutors would do their best to recommend as much leniency as would be compatible with the situation, but that they could make no promises and that he should go back to his cell and think it over (Tr. 434, 550, 690). The following morning, after he was advised again that the prosecutors could make no promises, but that "we will do what we can to help you out," he made a full confession (Tr. 483–484, 521, 691). Thereafter, he devoted a considerable amount of time assisting in the preparation of the case and he received a salary from the Government (Tr. 231, 485, 509–510).[6]

Messman testified that the references to wire tapping by Nelson and the assistant United States attorney in no way influenced his determination to confess and testify for the Government (Tr. 520, 540, 542, 552). He had realized the inevitability of detection as far back as September 1936 (Tr.

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sidered one of the principals here, it would be wise for you to indicate to us whether you intend to tell us everything and come clean, or whether you intend to play ball with the Garrows and the rest of the crowd. We feel that you can be of great value and you want to help yourself. That is straight talk."

[6] At the time Messman confessed nothing was said to him with regard to receiving a salary (Tr. 483).

519–520) when Weiss began to suspect that Kipnis was acting as an informer (Tr. 896–898), and he had thought of confessing two weeks prior to his arrest (Tr. 519). He had seen Kipnis at police headquarters when he was arrested and associated Kipnis' presence there with the incidents of September 1936 (Tr. 549). Messman testified further that when he was first taken to the federal building he was "ready to do the right thing." (Tr. 552). Messman assigned as his reasons for resolving to confess his belief that an investigation in which the Government had amassed a great deal of evidence had been going on for a long time, that many of his co-conspirators were undependable and would certainly confess, that Kipnis' office at 280 Broadway had been wired or watched, and that the Government probably knew "about our phony papers, phony hospitalization, and all that" (Tr. 574–576). Because of these factors he felt he must take the course that afforded him the best chance of retaining his license to practice medicine (Tr. 434, 690).

Although Messman stated he had decided to confess before learning of the wire tapping, he said he delayed doing so in order to size up his prosecutors and assure himself of favorable treatment (Tr. 540–545, 550). His controlling consideration was what terms he could make, not whether he could be proved guilty (*ibid.*). Consequently, what Nelson and the Government attor-

neys told him about wire tapping had nothing to do with his confession and willingness to testify (Tr. 520, 542, 552). The assistant United States Attorney's statement that Messman's telephone had been watched did not affect his intentions "because I came into that room with an idea of sizing up the various people who were going to question me and try to better my position if those people seemed to be decent people" (Tr. 540). "I was engaged in sizing up the people, not in listening to their arguments. I knew I was guilty" (Tr. 541). The interview affected his course of conduct only to the extent that it made him believe that he would receive some advantage by confessing (Tr. 544–545).

This explanation is supported by the testimony of the Government attorney that within a few minutes after he began questioning Messman, the latter said: "If you will guarantee me that I will come off scot free why I will give you, I will blow this racket into the open" (Tr. 690), and that on the next day when Messman was told that the prosecution would do what it could to help him out he immediately agreed to confess (Tr. 691). Moreover, unless Messman had already decided to confess, it is probable that he would not have done so before confirming the statements that the Government had proof against him; it is reasonable to suppose that he would have accepted the attorney's offer to play a record of his conver-

sations or would have asked to see some of the other evidence incriminating him (see Tr. 319, 539, 519, 552). In addition, at the time of the trial of the instant case, Messman must have known that the Government's wire tapping evidence could not be used against him under this Court's decisions in the *Nardone* and *Weiss* cases (see Tr. 502), yet such knowledge did not alter his desire to testify.

There is no evidence contradicting Messman's testimony as to his own mental processes, and his explanation is clearly plausible. His credibility was a matter for the trial court and its finding (*supra*, p. 16) to the effect that he was motivated by considerations of self-interest independent of knowledge as to wire tapping should not be overturned. The finding certainly cannot be characterized as clearly erroneous.

Refreshment of recollection: The evidence also was sufficient to show that the testimony of Messman should not be barred on the ground that the records of the intercepted communications were used to refresh his recollection. In September 1937, four months after he confessed, and when the Government was preparing for the trial of the *Weiss* case, a number of the recordings of intercepted telephone conversations were played to him for the first time. He identified them and initialed corrected transcripts. (Tr. 351–352, 356–357, 485–486, 523.) References to some of the transcriptions were made in the trial brief of

Messman's testimony prepared for the *Weiss* case (Tr. 509–510). Messman testified at the preliminary hearing in that case, however, that what he heard did not refresh his recollection, except as to dates and the explicit language of particular conversations, and merely served to assist him in organizing the narrative (Tr. 511–513, 488). He recalled independently all the significant conversations (Tr. 488). Weight is lent to Messman's testimony by the fact that from the date of his arrest in May 1937 to September 1937 he was questioned frequently by members of the United States Attorney's staff and supplied them with detailed evidence, yet had no access to the recordings and transcripts (Tr. 351). In the summer of 1937 he testified before the grand jury which returned the *Weiss* indictment for a longer period than he did at the trial of that case without ever having heard or seen any of the recordings or transcripts (Tr. 523–524, 730–731).

Upon the basis of the evidence presented at the preliminary hearing in the *Weiss* case, the trial court found as to Messman (34 F. Supp., at 102):

> He revealed at this hearing a complete mental picture of the entire series of events involved. The only incident as to which his memory was refreshed by the prohibited means was as to the exact time and duration of a given telephone conversation. They were indeed trivial incidents, although

perhaps convincing as to details. Without recourse to them his testimony otherwise should be available to the government in this case.

The trial court adopted and applied these findings in the instant case (Tr. 614) and the court below saw no reason to disturb them. Their validity in the instant case is particularly clear in view of the lapse of time prior to the present trial. The latter did not commence until June 1940, whereas Messman's last access to the records and transcriptions appears to have been nearly two years earlier (Tr. 366, 381). He testified, moreover, that he had never seen the transcript of his testimony in the *Weiss* case (Tr. 1288).

Garrow

Petitioners' contention that the testimony of Garrow was inadmissible is conceded to be weaker than is their similar contention as to Messman (Goldstein Br., 12). Following Garrow's arrest on May 18, 1937, the Government attorneys attempted to question him, but he claimed his privilege against self-incrimination, and they made no further efforts to obtain information from him. Wiretapping was not mentioned to him. (Tr. 341, 403; Def. Ex. CC[7]) In fact Gar-

[7] No question can be raised as to use of records of intercepted communications to refresh Garrow's recollection. He never saw any of the transcripts or heard any recordings (Tr. 413–415).

row had no suspicion that the Government had tapped his telephone wires until about a week after his arrest when he learned from Weiss and the newspapers that wire tapping, without reference to any particular conversation, had occurred (Tr. 415–418). Two years later, in April 1939, Garrow pleaded guilty to one of the insurance fraud indictments and was sentenced to imprisonment for twenty months (Tr. 342, 3013). After he had served six months of his sentence he applied for parole; thereafter he was visited at the penitentiary by the assistant United States attorneys. He was paroled in February 1940 and thereafter testified for the Government (Tr. 3015).

At no time was Garrow confronted with any evidence against him procured by wire tapping (Tr. 408, 419). Garrow testified that he knew that the Government had records of his telephone conversations, but that he had never heard them and did not believe they incriminated him (Tr. 415–417). The existence of these records, he said, had nothing to do with his decision to plead guilty (Tr. 412, 418).

In the light of this evidence it may not be said that the trial court was unwarranted in concluding that there was no relation between Garrow's knowledge that his telephone wires had been tapped and his action in turning state's evidence.*

* It is suggested (see Goldstein Br. 12) that the circumstance that Garrow pleaded guilty shortly after the Second

II

THE TRIAL COURT PLACED NO UNFAIR RESTRICTIONS UPON PETITIONERS AT THE PRELIMINARY HEARING

If the Court sustains our position under Point I, the only further questions which need be decided concern the fairness of the preliminary hearing and the fairness of the judge's charge to the jury at the trial. Since the first of these questions is related to Point I, we treat it at this place. The second question is discussed under Point V, *infra*, pp. 50–56.

The purpose of the preliminary hearing was to ascertain whether the proof against petitioners, or a substantial portion of it, derived from wire tapping. Petitioners contend that the trial judge

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Circuit approved the use of intercepted intrastate telephone communications in the *Weiss* case (103 F. (2d) 348) indicates that he was motivated by a belief that the recordings in the possession of the Government incriminated him. The court below rejected this contention (R. 23). It seems clear that the Second Circuit's decision in the *Weiss* case could have had no bearing upon Garrow's decision to testify in behalf of the Government in the case at bar, for when he made that decision, he had already been convicted and had served part of his sentence.

It is also suggested (Goldstein Br. 12) that the fact that Garrow sat through the *Weiss* trial when "wire taps" were introduced (Tr. 3032) in some way influenced his determination to testify. That trial, however, was held from January 6 to March 4, 1938, and Garrow did not plead guilty or decide to testify for the Government until more than a year later. Moreover, it does not appear that the "taps" introduced at the *Weiss* trial incriminated Garrow.

deprived them of a fair and adequate opportunity to inquire into that question in that he (1) refused to permit them to examine certain documents, (2) improperly limited cross-examination, and (3) permitted witnesses to state opinions and conclusions (Goldstein Br. 31–35; Schwartz Br. 20–22). This contention was overruled in the court below on the ground that petitioners had not been held on "too tight a rein" (R. 30–31).

1. The resolution of the problem raised by the first objection involves a determination of the extent to which the right of the accused to inquire into the sources of the prosecution's evidence is limited by the policy forbidding disclosure of the Government's case before its submission to the jury. This belongs with the "concrete complexities" foreseen in the second *Nardone* case which moved this Court to entrust a large measure of discretion to the trial judge (308 U. S. at 341, 342).

We have already demonstrated that the Government established that its evidence derived from sources independent of wire tapping. In the development of the proof of these independent sources, witnesses connected with the prosecution testified as to the contents of portions of inspector Shea's report (Tr. 284–293), the transcript of Messman's first interview with members of the United States Attorney's staff (Tr. 316–321, 326–327, Ex. BB), and the daily reports, confession, and case histories of Kipnis (Tr. 623–678, Exs. 1, 5

and 6). Petitioners contend that they should have been permitted to inspect these documents, as well as the trial brief of Messman's testimony prepared for this case (Tr. 364–371, Ex. DD) and the statements made by Messman to the assistant United States attorneys subsequent to his agreement to testify for the Government (Tr. 351–354, 371–373 Exs. BB, EE).

These documents and statements showed what information the Government had. Shea's report digested all the facts uncovered in the private investigation carried on by the insurance companies over a period of months (see Tr. 156–158, 287–288, 619). The statements of Messman and Kipnis' confession and reports were accounts of everything revealed by these two key figures who for years had been in the center of the conspiracies (see Tr. 351–353, 355, 372–373, 638–640). And the trial brief of Messman's testimony was described as containing "the Government's whole case without wire-tapping" (Tr. 370). These documents would have disclosed to the defendants the bulk of the evidence in the Government's possession. It is just such disclosures that this Court sought to guard against by its caveat in the second *Nardone* case (308 U. S. at 342) that "claims that taint attaches to any portion of the Government's case must satisfy the trial court with their solidity and not be merely a means of eliciting what is in the Government's possession before its submission to

the jury." This is, of course, but an aspect of the policy of federal courts to refuse a discovery of the Government's case in advance of trial. Cf. *Wong Tai* v. *United States*, 273 U. S. 77, 82; *United States* v. *Molasky*, 118 F. (2d) 128, 132 (C. C. A. 7); *United States* v. *Garsson*, 291 Fed. 646, 649 (S. D. N. Y.).

It is to be noted further not only that the documents in question were products of, and embodied the result of, the investigative phase of criminal law administration, but that they indicated widespread crimes involving numerous possible defendants; Shea's report recommended the indictment of seventy-five persons and named some of the suspects (Tr. 287). To have made the documents public by spreading them on the record would have warned those not yet prosecuted of evidence in the Government's possession implicating them, and persons perhaps to be cleared through further investigation might have been linked with criminals. Principles of sound policy and fairness, therefore, weighed heavily in favor of keeping the documents confidential. *Arnstein* v. *United States*, 296 Fed. 946, 950 (App. D. C.), certiorari denied, 264 U. S. 595. Cf. *Vogel* v. *Gruaz*, 110 U. S. 311; *In re Quarles and Butler*, 158 U. S. 532. See also Department of Justice Circular No. 3229, issued pursuant to R. S. 161 (5 U. S. C., Sec. 22), set forth in the Brief (p. 52) for the United States in *Goldman et al.* v. *United States*, Nos. 962, 963, 980, October Term, 1940.

Faced with the task of balancing the foregoing considerations against the speculative handicap non-disclosure would impose upon the accused, the trial judge adopted the course of reading the documents himself and then making available to the defense those portions which he considered to be related to wire tapping. Thus, he read into the record the portion of the transcript of the interview with Messman which contained mention of wire tapping (Tr. 318–320, 334). Likewise he called attention to the one extension telephone recording referred to in Shea's report (Tr. 294–295). Counsel also was permitted to read the portions of the trial brief of Messman's testimony in the *Weiss* case which contained marginal notations referring to wire taps (Tr. 520, 524–534; Ex. X).

As noted by the court below (R. 30), the nature of the hearing was such that the judge necessarily had to "feel his way," and we believe that the practice he followed, at several points suggested by the defense itself (see Tr. 132, 276, 320), was a practicable and fair way of solving the delicate problem presented. *United States* v. *Socony-Vacuum Oil Co.*, 310 U. S. 150, 233–234. In addition to his personal examination of the documents, his ruling that additional objections based upon wire tapping would not be foreclosed by the preliminary hearing, but could be taken during the course of the trial, served to safeguard petitioners' rights (Tr. 478, 615). This ruling, together with

the fact that the records and transcriptions of the intercepted communications had been made available for inspection and were available at the trial (See Tr. 134–137, 145–150, 205, 602–605), gave petitioners ample opportunity to pursue the investigation further if the testimony at any time indicated a need for it.

The procedure adopted by the trial court can be condemned only under a view that once wire tapping has been utilized every document and detail of evidence in the possession of the Government must be subjected to the unrestricted scrutiny of the defense. Such a doctrine would frustrate the Government's right under the second *Nardone* decision to use uncontaminated evidence, for a requirement that it expose its case in advance would make successful prosecution highly unlikely.

Petitioners' remaining objections to the conduct of the hearing require little comment.

2. Petitioner Goldstein lists (Br. 32) five instances in which alleged restrictions were placed upon cross-examination (Tr. 126, 153, 175, 180, 348). It cannot be said that these instances handicapped the development or presentation of petitioners' case. In each instance the witness had been called by the defense. In none did petitioners except to the ruling of the court. In three of the instances counsel expressly withdrew the question objected to (Tr. 126, 175, 180). The record shows

that the court permitted petitioners wide latitude in the examination of witnesses. At no time were they denied an opportunity to re-examine witnesses after they and the Government had examined and cross-examined (see Tr. 160–166, 192, 259–263, 576–593).

3. Nor can the expressions of conclusions or opinions of which petitioners complain be regarded as prejudicial. The preliminary hearing was, of course, held without a jury, and it may be presumed that the court was able to evaluate the opinions for what they were worth. The nature of the hearing was such that it was inevitable that such questions would be asked and that opinions would be volunteered.

III

THE TESTIMONY OF MESSMAN AND GARROW WAS NOT INADMISSIBLE UNDER SECTION 605 OF THE FEDERAL COMMUNICATIONS ACT EVEN IF INFORMATION OF THE FACT THAT THE GOVERNMENT HAD EVIDENCE AGAINST THEM OBTAINED BY ILLEGAL WIRE TAPPING ENTERED INTO THEIR DECISION TO CONFESS AND TESTIFY

We have shown thus far that the trial court found that there was no causal relationship between the illegal wire tapping and the action of Messman and Garrow in testifying as they did, and that such finding is not invalid for lack of sufficient evidence or a fair hearing. However, even if it were assumed that the trial court was required

by the evidence to find, or did find, that such a relationship existed, Section 605 of the Federal Communications Act would not render their testimony inadmissible. This contention is not foreclosed by the decisions in the *Weiss* and second *Nardone* cases.*

In the first place, in view of the evidence summarized under Point I (*supra*, pp. 18–31), the causal connection, if any, was "so attenuated as to dissipate the taint." *Nardone* v. *United States*, 308 U. S. 338, at 341. The strongest inference which might be made from the evidence is that their knowledge that the Government had records of interceptions was a contributing, not the sole or primary, factor which initially decided Messman

* The second *Nardone* case is discussed *infra*, pp 42–43. In the *Weiss* case the Court held that Section 605 prohibits the disclosure in evidence of an illegally intercepted intrastate communication, and that such a disclosure is not permissible as "authorized by the sender" where one of the defendant parties to the communication, which was intercepted without his consent, after being informed of the Government's knowledge of the contents thereof and being subjected to inducements recited by the Court, decided to turn state's evidence and testified to the contents of the communication. The Court held that this was not the authorization by the sender contemplated by the statute 308 U. S. 321, 329–330. That decision, however, did not establish that Section 605 is to be construed to prohibit the testimony of persons who were induced to turn state's evidence by being apprized that the Government had wiretapping evidence against them, where, as here, their testimony did not divulge the contents of any intercepted communication or include any fact discovered from clues contained in such a communication.

and Garrow that it would be to their interest to confess and testify. Moreover, they did not later take the stand until long after this Court had determined in the *Nardone* and *Weiss* cases that the Government could not introduce evidence obtained by wire tapping. Hence in testifying they could hardly have been motivated by their knowledge that the Government had such evidence.

Their testimony, moreover, was testimony from their own lips as to facts known by them out of their own experience in the conspiracy; it was not testimony as to the contents of any intercepted communication or as to facts discovered from clues contained in any such communication. They were examined and cross-examined. The truth or falsity of their testimony, and the weight to be given it, were subjected to the tests usual in trials; indeed, the judge used strong language in cautioning the jury to scrutinize their testimony with "the utmost care" and in the light of the fact that they were of "a very low moral character" and were "crooks" (R. 7–8). In these circumstances, to exclude their testimony as a matter of policy in aid of enforcing the prohibitions of Section 605 would seem to go very far in the realm of judicial sanctions designed to promote compliance with the statute. The instant case may not be invoked as an example of an alleged need for such sanctions. The interceptions occurred prior to this Court's decisions in the *Nardone* and *Weiss* cases, when the Government deemed Section 605 to be inapplicable (see Tr. 848), as did the court below.

Upon examination of the terms of Section 605, in the light of the legislative history,[10] it indeed seems that the testimony of Messman and Garrow would have been admissible even assuming that they testified solely as a result of their knowledge of the existence of the wire taps and would not have done so in the absence of such knowledge. The pertinent provisions of the section read as follows:

> * * * and no person not being authorized by the sender shall intercept any communication and divulge or publish the existence, contents, substance, purport, effect, or meaning of such intercepted communication to any person; * * * and no person having received such intercepted communication or having become acquainted with the contents, substance, purport, effect, or meaning of the same or any part thereof, knowing that such information was so obtained, shall divulge or publish the existence, contents, substance, purport, effect, or meaning of the same or any part thereof, or use the same or any information therein contained for his own benefit or for the benefit of another not entitled thereto * * *.

In the instant case neither the intercepted communications nor their existence, contents, sub-

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[10] The legislative history, which shows that Congress had no deliberate intention of prohibiting wire tapping by Government enforcement officers or the introduction of evidence so obtained, is set forth in the Government's brief in the first *Nardone* case (No. 190, October Term, 1937).

stance, purport, effect, or meaning were divulged by being put in evidence either directly or through the testimony of Messman or Garrow. On the contrary, Messman and Garrow testified only to facts which they knew out of their own experience in the conspiracy and which they would have known in the absence of any wire tapping. Thus, unlike the situation in the first *Nardone* and *Weiss* cases, no violation of the disclosure provisions of the statute occurred at the trial in this case. Any such violation was in the past, when the Government attorneys may be said to have disclosed to Messman, but not to Garrow, the "existence" and "purport" of intercepted communications, although not of any particular communication within the possible meaning of the statute.

Nor at the trial was there any violation of the provision that no person shall beneficially "use the same (i. e., illegally intercepted communication) or any information therein contained * * *." Even if it were to be assumed that the Government attorneys engaged in a "use" of the communications in calling Messman and Garrow to the stand after, by hypothesis, the latter had been induced to testify as a result of being told of the interceptions, ~~to testify,~~ it would not follow that their testimony was inadmissible. For a "use" must be "for his own benefit or for the benefit of another not entitled thereto * * *." The language of this requirement scarcely comports with an inten-

tion on the part of Congress to bar testimony such as is here involved. On the contrary, it indicates that Congress had in mind only such uses as were designed to result in some monetary or other similar benefit of a private nature.

In the second *Nardone* case, it is true, the Court ruled that the prohibition of Section 605 is not limited to the disclosure at the trial of the contents of an intercepted communication, but extends to the divulgence of evidence obtained through derivative uses thereof. 308 U. S. 388. The Court did not discuss or rest its opinion upon the language of the section. It relied instead on the view that a broad meaning should be given the statutory terms in order to effectuate the policy formulated by Congress. 308 U. S. at 340. However, the legislative history fails to reflect any policy which would exclude relevant testimony such as that of Messman and Garrow, who testified only as to facts within their own personal knowledge acquired independently of any wire tapping (*footnote 10, supra*, p. 40). For this reason and in view of the fact that the decision in the second *Nardone* case enunciated a general rule, which went further than analogous common law rules of evidence, and was not a holding on the precise type of situation here involved, we submit that the testimony of Messman and Garrow properly was admitted even assuming that their action in testifying was brought about as a result of their being told that the Government had wire tapping evidence against them.

The adoption of this view would, in effect, limit the scope of Section 605 under the ruling in the second *Nardone* case to instances in which the facts divulged in evidence, as distinct from the witnesses agreeing to testify, were obtained through some use of an intercepted communication, as where, for example, the communication afforded clues used to discover matters later put in evidence. Even so limited, however, the section would be far broader than the rule governing the admissibility of evidence derived from involuntary confessions, although the considerations of policy favoring sanctions in aid of discouraging wire tapping would appear to be no greater than those with respect to discouraging coercion in obtaining confessions. Under the involuntary confession rule, "notwithstanding the inadmissibility of the confession, all facts discovered in consequence of the information given by the accused, and which go to prove the existence of the crime of which he is suspected, are admissible as testimony." 2 Wharton's *Criminal Evidence*, sec. 600, p. 995 (11th ed., 1935).[11]

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[11] See also *United States* v. *Richard*, Fed. Cas. No. 16,154; *United States* v. *Hunter*, Fed. Cas. No. 15,424. See also *Lewis* v. *State*, 220 Ala. 461; *Shufflin* v. *State*, 122 Ark. 606; *Osborn* v. *People*, 83 Colo. 4; *Jones* v. *State*, 75 Ga. 825; *People* v. *Ascey*, 304 Ill. 404; *State* v. *Moran*, 131 Ia. 645; *State* v. *Turner*, 82 Kan. 787; *McQueen* v. *Commonwealth*, 196 Ky. 227; *Belote* v. *State*, 36 Miss. 96; *State* v. *Simpson*, 157 La. 614; *Dupuis* v. *State*, 14 Ohio App. 67; *State* v. *Dixson*, 80 Mont. 181; *Walrath* v. *State*, 8 Neb. 80; *State* v. *Riddle and Huffman*, 205 N. C. 591; *Duffy* v. *People*, 26 N. Y.

IV

SINCE PETITIONERS WERE NOT PARTIES TO THE INTERCEPTED COMMUNICATIONS, THEY HAVE NO STANDING TO OBJECT TO THE INTRODUCTION OF EVIDENCE OBTAINED THEREBY

If the Court rejects our contentions that no part of the proof upon which petitioners were convicted derived from illicit wire tapping, and that even if the contrary were true the connection was so indirect as to be without the scope of Section 605, it should hold that, in any event, petitioners have no standing to invoke the protection of the Act, since they were not parties to any of the intercepted conversations.[12] Such was the first of the grounds upon which the court below sustained the convictions (R. 24–28).

It has long been recognized that the competence of evidence otherwise admissible is not affected by the fact that it was obtained by illegal means. *Bishop Atterbury's Trial*, 16 How. St. Tr. 490, 495, 629 (1723); *Jordan* v. *Lewis*, 2 Stra. 1122, 14 East

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588; *State* v. *Motley*, 7 Rich. Law 327 (S. C.); *Collins* v. *State*, 169 Tenn. 393; *Bryant* v. *State*, 131 Tex. Cr. R. 274; *State* v. *Cocklin*, 109 Vt. 207; *Smith* v. *State*, 166 Miss. 893.

[12] Petitioner Goldstein asserts (Br. 23) that it was discovered subsequent to the decision of the court below that he was a party to eight of the conversations which were intercepted. (See also Schwartz Br. 3.) However, he concedes (Br. 23) that the record does not show this alleged fact, and he does not specify whether the alleged conversations related to the conspiracy or were in any way used by the Government.

306 (1740); *Hester* v. *United States*, 265 U. S. 57; *Olmstead* v. *United States*, 277 U. S. 438, 466–469; *People* v. *Defore*, 242 N. Y. 13, certiorari denied, 270 U. S. 657. Only where some over-riding policy of the Constitution or law of the land requires it will such evidence be excluded. See *Nardone* v. *United States*, 308 U. S. 338, 340. That rule of exclusion is remedial in nature; its purpose is to protect one whose right has been invaded. For this reason it has been uniformly held that only the victim of a search or seizure violative of the Fourth Amendment can object to the admission of evidence so procured; a defendant can object only to the invasion of his own rights.[13] The reasons of policy underlying the rule were stated in *Connally* v. *Medalie*, 58 F. (2d) 629, 630 (C. C. A. 2), per L. Hand, J., as follows:

> We assume for argument that the search and seizure were unlawful; and that any persons aggrieved might suppress the evidence so acquired. None of the petitioners fall within that class. * * * The power to suppress the use of evidence unlawfully

[13] See, e. g., *Whitcombe* v. *United States*, 90 F. (2d) 290 (C. C. A. 3), certiorari denied, 302 U. S. 759; *Belcher* v. *United States*, 50 F. (2d) 573 (C. C. A. 8); *Shore* v. *United States*, 49 F. (2d) 519 (App. D. C.), certiorari denied, 283 U. S. 865; *Ingram* v. *United States*, 113 F. (2d) 966 (C. C. A. 9); *Creech* v. *United States*, 97 F. (2d) 390 (C. C. A. 5); *Remus* v. *United States*, 291 Fed. 501 (C. C. A. 6), certiorari denied, 263 U. S. 717; *MacDaniel* v. *United States*, 294 Fed. 769 (C. C. A. 6), certiorari denied 264 U. S. 593; *Coon* v. *United States*, 36 F. (2d) 164 (C. C. A. 10),

> obtained is a corollary of the power to regain it. The prosecution is forbidden to profit by a wrong whose remedies are inadequate for the injury, unless they include protection against any use of the property seized as a means to conviction. The relief being thus remedial, the evidence has never been thought incompetent against anyone but the victim. Conceivably it might have been; but might have been held that the prosecution, though not disqualified from taking advantage of another's wrong (*Burdeau* v. *McDowell*, 256 U. S. 465, 41 S. Ct. 574, 65 L. Ed. 1048, 13 A. L. R. 1159), should not profit in any wise by its own. But that would obviously introduce other than remedial considerations; the doctrine would then be like that of equity which denies its remedies to one who is not himself scathless.

In cases involving the application of the self-incrimination clause of the Fifth Amendment the courts have been guided by similar considerations. See *Boyd* v. *United States*, 116 U. S. 616, 630; *Gouled* v. *United States*, 255 U. S. 298, 303, 306. It has been consistently held that the right or privi-

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Petitioner Schwartz argues (Br. 11–13) that this rule should be disapproved by this Court because it is inconsistent with the policy of the Fourth Amendment. But the right of the victim to suppress the use of evidence has always been considered a sufficient protection of his right under the Fourth Amendment to be secure against unreasonable searches and seizures. Cf. *Agnello* v. *United States*, 269 U. S. 20, 35.

lege conferred is personal. *Hale* v. *Henkel,* 201 U. S. 43, 69; *Wilson* v. *United States,* 221 U. S. 361; *Grant* v. *United States,* 227 U. S. 74. Thus, if a witness' privilege against self-incrimination is ignored, the party against whom he testified has no standing to claim error. *Morgan* v. *Halberstadt,* 60 Fed. 592, 596 (C. C. A. 2). Similarly, in the case of privileged communications, such as those between attorney and client, husband and wife, and doctor and patient, only the party intended to be protected may object to disclosure; the privilege is not available to third persons or to the state. Wigmore, *Evidence* (3d ed. 1940), Secs. 2196, 2270, 2326.

Section 605 of the Federal Communications Act provides that no person "not being authorized by the sender" shall intercept and divulge any communication, and that no person learning of the contents of "such" communication and knowing that the information was "so obtained" shall use the communication for his own benefit or for the benefit of another not entitled thereto. Except as is indicated in the phrases quoted, the statute does not explicitly reveal whether it was intended to confer a right of objection personal to the sender.[14] By analogy to interpretation of the Fourth and Fifth Amendments and to the usual rules of evidence, however, such a construction

[14] In the case of a telephone conversation there would appear to be two senders. *United States* v. *Polakoff*, 112 F. (2d) 888 (C. C. A. 2), certiorari denied, 311 U. S. 653.

seems proper. Since the section is not violated if the sender authorizes the particular interception, Congress evidently intended to protect him and him only.[15]

If, then, Section 605 creates for the sender alone a privilege similar to that conferred by the Fourth and Fifth Amendments, it does not outlaw the introduction of evidence illegally obtained through wire tapping as against persons, such as the petitioners, not the sender. There are no controlling considerations of policy which should lead to a different rule, and the principle of *Connolly v. Medalie* and the other cases cited at page 46, *supra,* seems as applicable to the statute as to the Fourth Amendment.

Petitioners argue that Section 605 should be interpreted differently because it prohibits not only the acquisition of information by wire tapping, but its divulgence and use as well, whereas it is only by virtue of judicial decisions, not the language of the Fourth Amendment, that evidence obtained by an unlawful search or seizure is excluded (Goldstein Br. 19–25; Schwartz Br. 14–20). The fact is, however, that the Fourth Amendment, as judicially construed, does forbid

[15] Only the sender could maintain a civil action for damages based upon interception, and he, without the concurrence of anyone, could undoubtedly permit disclosure after a communication had been illegally intercepted. The decision in *Weiss* v. *United States*, 308 U. S. 321, in holding that the consent of the sender was not voluntary, seemingly assumed that if it had been, divulgence would have been proper.

the receipt or use of unconstitutionally acquired evidence. *Silverthorne Lumber Co.* v. *United States,* 251 U. S. 385. And in the second *Nardone* case (308 U. S. 338, 340–341) this Court did not rest its decision upon the explicit terms of Section 605 but upon the analogy of the Fourth Amendment as construed in the *Silverthorne* case. Since that Amendment forbids the use of illegally acquired evidence only as against the victim of the search or seizure, we see no reason why a similar rule should not be applied under Section 605.

The contention is untenable that the decision in *Weiss* v. *United States,* 308 U. S. 321, is a holding that the protection of Section 605 extends to persons not parties to the intercepted communications. Although the Court there reversed the conviction of Goldstein, whose conversations had not been intercepted, the point here made was neither argued by the Government nor discussed by the Court. For all that appears, Goldstein's conviction may have been reversed because the error as to the other defendants, whose wires had been tapped, was considered prejudicial to him. Cf. *United States* v. *Thomson,* 113 F. (2d) 643 (C. C. A. 7).

V

THE TRIAL COURT'S CHARGE TO THE JURY WAS NOT UNFAIR OR PREJUDICIAL

Petitioners object to those portions of the trial judge's charge in which he drew the attention of

the jury to possible avenues of inquiry in their consideration of the case. This was done through the method of posing certain questions the answers to which, he suggested, might be helpful in determining the guilt or innocence of the accused (R. 9–19). It is claimed that the questions were "rhetorical" and were so phrased as to express to the jury the court's opinion that petitioners were guilty, and that the court emphasized evidence damaging to petitioners and failed to review petitioners' explanations of the incidents to which the questions were directed. Petitioners say that the charge was therefore "one-sided" and prejudicial.[16] (Goldstein Br. 35–42; Schwartz Br. 22–29). At the time, however, their objections, especially those of petitioner Schwartz, were more limited

[16] Petitioner Rubin asserts (Br. 3–14) that the trial judge erred in denying his request for an instruction that in order for a claimant to recover on a claim for total and permanent disability he need not be absolutely helpless. He then attempts to show, by a review of the evidence, that his claim was not fraudulent. The latter portion of his argument is not covered by the specification of errors (Pet. 20). The denial of the requested instruction was proper for, as the trial judge stated, the test to be applied in a civil action upon the contract of insurance had no bearing upon the issue of Rubin's guilt (Tr. 5164). The question as to Rubin was whether his claim was based upon fraudulent misrepresentations and that was left to the jury under proper instructions (R. 11).

Rubin's further contention (Br. 14–16) that the trial court erred in preventing him from showing what his physical condition was shortly before the trial is outside the specification of errors (Pet. 20) and, in any event, is clearly without merit.

than those now urged (Tr. 5153–5159, 5161). Cf. *United States* v. *Socony-Vacuum Oil Co.*, 310 U. S. 150, 239.

It is well settled, of course, that a federal judge may draw attention to and comment on the evidence which he deems important, and even express his opinion on the facts so long as he does not by command or other coercion infringe upon the jury's province to determine them. See *Horning* v. *District of Columbia*, 254 U. S. 135, 138, 139; *Quercia* v. *United States*, 289 U. S. 466, 469; *United States* v. *Murdock*, 290 U. S. 389, 394. Tested by these criteria the charge here when read in its entirety was perfectly proper. The testimony was lengthy. Comment on it, always permissible in the Federal courts, was particularly appropriate. The trial judge was careful to emphasize that he was expressing no opinion as to the guilt or innocence of the defendants (R. 2), and that in commenting upon the evidence and suggesting certain questions for the jury's consideration he did not intend to imply what their conclusions should be (R. 9). The jury, he said, had the right to disregard the questions (*ibid.*). Certainly there is no rule imposing upon the trial judge a duty to refrain from pointing out to the jury the rational implications of the evidence. *United States* v. *Frankel*, 65 F. (2d) 285, 288 (C. C. A. 2), certiorari denied, 290 U. S. 682.

Nor can the charge be condemned because the

trial judge did not emphasize the defendants' explanations of the incidents he recalled. The judge was not required to mention all the items of evidence, especially where as here he disavowed any intention to insinuate that those he cited were "the only important elements in the case" and explicitly told the jury that all the evidence was important (R. 9). *Allis* v. *United States*, 155 U. S. 117, 124.

The judge was equally explicit in his instructions that the determination of questions of fact was for the jury; he specified that the jury was in no way bound by what he said regarding the evidence and that the jury was completely free to approach the facts in its own way and reach its own conclusions. Thus, before making any comment, the judge said:

> * * * Nor in commenting on the testimony do I intend to suggest now what your conclusion should be. I may suggest to you that you may wish to ask yourselves certain questions. In doing that I do not insist, I have no right to insist, that you ask yourselves those questions. You have a right to disregard them (R. 9).

After referring to Messman and Garrow and their associations with petitioners Goldstein and Schwartz, the judge repeated this admonition:

> * * * Again I remind you I am not suggesting the answer to these questions, but I am merely pointing out to you that you may wish to ask these questions of

> yourself in order to reach a conclusion as to what was present in the minds of Goldstein and Schwartz by way of understanding what they were doing in dealing with these various cases that were brought to them by Garrow or Garrow and Messman (R. 14–15).

Later, in speaking of Goldstein, the judge said:

> * * * He was paid by Garrow. What do you say as to his conduct with Garrow over these years? Was it such as was calculated to apprise him of Garrow's activities or not? If it was not, do not hesitate to reach that conclusion and, of course, the same applies to Dr. Schwartz (R. 16–17).

It seems clear, therefore, that the jury understood that it was free to decide all questions of fact and that it was, as the court instructed, the "sole judge of the witnesses" (Tr. 5170). The court below commented that in its decisions it had "repeatedly gone farther than the judge did here" (R. 29).

Neither *Quercia* v. *United States*, 289 U. S. 466, nor *United States* v. *Murdock*, 290 U. S. 389, the principal authorities upon which petitioners rely, support their contention. Both decisions turned on the question whether the jury was left free to exercise its own independent judgment upon the evidence. In the *Quercia* case the judge in his charge told the jury that the defendant's habit of wiping his hands was "almost always an

indication of lying," although there was no such evidence. He also said "I think that every single word that man said, except when he agreed with the Government's testimony, was a lie." It was, therefore, held that the judge had added to the evidence and in effect repudiated as lies all that the defendant said in conflict with the testimony for the prosecution.

In the *Murdock* case, the issue of the defendant's guilt turned upon whether he had wilfully refused to give information as to his income-tax returns. The judge told the jury he believed the defendant had been proved guilty beyond a reasonable doubt, and he refused a request to instruct the jury that if it believed the refusal to answer questions was in good faith, that should be considered in determining whether the defendant had acted wilfully. It was held that in the absence of the requested instruction the effect of the charge was to tell the jury that the refusal to answer was in bad faith and wilful, and thus to fail to submit that issue to the jury. Plainly the charges condemned in these two cases are not comparable with the charge here. Indeed, the opinions permit of no doubt as to the latter's propriety.

CONCLUSION

The trial court found that the Government's proof was derived from sources independent of illegal wire tapping. The court below stated, in

effect, that the evidence was sufficient to support such a finding and no question as to the validity of this conclusion is raised by petitioners' assignments of error or statements of questions presented. Moreover, the evidence was ample. Affirmance of the convictions thus does not depend upon any disputed issue as to the meaning of Section 605 of the Federal Communications Act. Even if the contrary were true, the result would be the same. Petitioners had a fair hearing and the trial court's charge was proper.

It is respectfully submitted that for these reasons petitioners were properly convicted and that the judgment below should be affirmed.

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P. 5.

SUPREME COURT OF THE UNITED STATES.

No. 256.—October Term, 1941.

Dr. Maximilian Goldstein, Dr. Benjamin Schwartz, Herman Rubin, and Irving Eldinoff, Petitioners,
vs.
The United States of America.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

[April 27, 1942.]

Mr. Justice Roberts delivered the opinion of the Court.

This case involves the alleged violation of § 605 of the Federal Communications Act[1] by the admission of testimony in a federal criminal trial. The importance of the questions presented, and a claimed conflict with our decisions, moved us to grant certiorari.

The petitioners and others were indicted under the mail fraud[2] and conspiracy[3] statutes. The alleged scheme was to defraud insurance companies by presenting false claims for disability benefits.

At the opening of the trial the petitioners moved that the court suppress all records and transcripts of intercepted telephone messages; suppress all evidence the Government obtained by the use of such messages; suppress the testimony of any witness obtained in the first instance by the use of such messages, and that of any witness whose recollection had been refreshed or aided by such messages.

A preliminary hearing was conducted by the trial judge in accordance with the practice established in *Nardone* v. *United States*, 308 U. S. 338. The principal subject of contention was the prospective testimony of Messman and Garrow, alleged co-conspirators who, the petitioners asserted, had confessed and turned state's evidence because they had been confronted with intercepted telephone messages. Messman and Garrow were parties to these mes-

[1] Act of June 19, 1934, c. 652, 48 Stat. 1064, 1103; 47 U. S. C. § 605.
[2] Criminal Code § 215; 18 U. S. C. § 338.
[3] Criminal Code § 37, 18 U. S. C. § 88.

sages, or some of them, but the petitioners were not.[4] The judge ordered all records and transcripts of intercepted messages suppressed as well as all evidence obtained as a result of such messages, but he refused to order suppression of the testimony of witnesses whose memories had been refreshed or aided thereby. He reserved to the trial final decision on so much of the motion as requested the suppression of testimony alleged to be the result of information derived from the messages.

At the trial Government witnesses testified that wire tapping had not furnished clues used in preparing the case. Messman and Garrow were permitted to testify to the facts of which they claimed to have knowledge, over the objection of petitioners. They did not refer to any intercepted messages or to their contents.

The petitioners were convicted and the judgments were affirmed on appeal.[5] The Circuit Court of Appeals held that the convictions ought not to stand if either Messman or Garrow should not have been allowed to testify. It thought that the petitioners having proved divulgence by federal officers of the messages to the witnesses, the burden was upon the Government to prove that their testimony was not induced thereby; that the trial judge failed to find the wire tapping had not been a means of inducing them to testify, but found only that the petitioners had failed to prove it had been the means. In this situation the court was of opinion that if the admission of testimony induced by use of the messages was prohibited by the Communications Act, the judgments should be reversed. The court ruled, however, that, as the petitioners were not parties to any of the intercepted communications, they had no standing to object to their divulgence. In the alternative, it ruled that the testimony was not a divulgence within the meaning of § 605 but, at most, the presentation in court of evidence procured through past divulgences. The court also overruled petitioners' contentions that they had been denied their full right of cross-examination at the preliminary hearing and that the charge to the jury was improper.

We have considered all the assignments of error but find no substance in any of them save those which go to the admission of

[4] It is said that petitioners have now discovered that Goldstein was a participant in twelve of the intercepted telephone conversations, but it is admitted that the record does not disclose this fact and there is no allegation that any of the twelve communications were used in obtaining the confessions.

[5] 120 F. 2d 485.

Messman's and Garrow's testimony. In briefs and oral argument the parties have labored the subject of the burden of proof at the preliminary hearing. The petitioners say it lay with the Government after a showing of wire tapping and divulgence; the respondent says it lay with the petitioners throughout. Each asserts the other failed to carry it. In our view, a decision upon the point is unnecessary.

We come to the capital and pivotal question: Assuming the witnesses' testimony was induced by divulging to them the contents of intercepted telephone messages, was the admission of this testimony erroneous? We hold that it was not.

The petitioners assert that § 605 of the Federal Communications Act forbids the admission of evidence obtained by the use in advance of the trial of unlawfully intercepted telephone conversations, and that one who was not a party to such communications has standing to object to the admission of such evidence. They insist that the decisions of this court in *Weiss* v. *United States*, 308 U. S. 321, and *Nardone* v. *United States*, 308 U. S. 338, require us so to hold and that the court below, in ruling to the contrary, failed to follow those decisions.

It may be helpful in the consideration of these contentions to quote the relevant portions of the statute and to recapitulate this court's decisions in cases involving the admission of evidence in alleged violation of its terms. The relevant provisions of the section declare that " . . . no person not being authorized by the sender shall intercept any communication and divulge or publish the existence, contents, substance, purport, effect, or meaning of such intercepted communication to any person", and that "no person having received such intercepted communication or having become acquainted with the contents, substance, purport, effect, or meaning of the same or any part thereof, knowing that such information was so obtained, shall divulge or publish the existence, contents, substance, purport, effect, or meaning of the same or any part thereof, or use the same or any information therein contained for his own benefit or for the benefit of another not entitled thereto. . . ."

In *Nardone* v. *United States*, 302 U. S. 379, we held that the Government's introduction of transcripts and recordings of intercepted interstate messages in the trial of a criminal case constituted a divulgence of such messages contrary to the express terms of the statute.

In *Weiss* v. *United States*, 308 U. S. 321, intrastate telephone communications were intercepted by federal agents, their contents were divulged to certain of the defendants, and, as a result these defendants confessed and agreed to turn state's evidence. They were permitted to testify to the contents of the messages. We held that the interdiction of the statute extended to the interception and divulgence of intrastate as well as interstate messages. In the light of the facts we denied the Government's claim that the witnesses' testifying to the contents of the messages amounted to an authorization by them, as senders, of the divulgence of the communications within the meaning of the statute.

In *Nardone* v. *United States*, 308 U. S. 338, it was claimed that unlawfully intercepted messages had been used to obtain evidence against the senders, and that such use, and the introduction of the evidence so obtained, over the objection of the senders, who were defendants, constituted a violation of the purpose and policy of the statute. We held that if the facts sustained the claim the evidence should have been excluded, and we formulated a procedure for ascertaining the facts.

In none of these cases did this court pass upon the question now presented. In the instant case, the witnesses who confessed and turned state's evidence did not testify either to the existence of the communications or to their contents. The contents of messages to some of which they were parties, but to which the petitioners were not parties, were used by the Government, as we assume, to persuade the witnesses to testify. We further assume that the interception and divulgence of the messages to these witnesses was unlawful because not authorized by the sender.

The petitioners urge that our decision in *Weiss* v. *United States, supra*, necessarily involved the ruling that one who was not a party to the intercepted messages has standing to object to their divulgence at the trial, and, in view of our application of the statute in *Nardone* v. *United States*, 308 U. S. 338, he has standing to object to testimony induced as a result of unlawful interception and use of the messages.

The question now presented was not decided in *Weiss* v. *United States, supra*. The charge was conspiracy. Goldstein, who was not a participant, and other defendants who were participants, in the intercepted conversations, were tried together. All objected to testimony respecting the conversations. We held the

evidence inadmissible. The fact that Goldstein was not a party to the communications, was not overlooked. In the opinion rendered by the Circuit Court of Appeals it was held that the fact could not sustain his conviction if the messages were erroneously introduced.[6] This court assumed, in deciding the case, that the Circuit Court of Appeals was right in holding that, if the admission of the evidence was wrong as to the other defendants, the judgment ought to be reversed as to all. And the Circuit Court of Appeals was of opinion in the present case that, in the circumstances, the messages could not have been used in the *Weiss* case against one of the defendants and excluded as to the others with any reasonable expectation that prejudice would not have resulted to the defendants as to whom the admission of the messages would have been error.[7] In this view we concur.

None of the petitioners was a party to the communications used in obtaining the evidence in this case, No prejudice, therefore, could result by reason of the difficulty of nullifying the effect upon some defendants of evidence incompetent as to them but competent as against other defendants.

It has long been settled that evidence obtained in violation of the prohibition of the Fourth Amendment cannot be used in a prosecution against the victim of the unlawful search and seizure if he makes timely objection.[8] This, for the reason that otherwise the policy and purpose of the amendment might be thwarted. And we have further held that the policy underlying the amendment cannot be circumvented by the indirect use against the victim of evidence so obtained.[9]

Although the unlawful interception of a telephone communication does not amount to a search or seizure prohibited by the Fourth Amendment,[10] we have applied the same policy in re-

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[6] "It may be said with some plausibility that the defendant Goldstein was not prejudiced since he was neither a party to, nor mentioned in, the conversations obtained through wire tapping. These conversations, however, showed that Goldstein's codefendants were engaged in a conspiracy which other proof indicated that he joined. They also gave credence to the testimony of Messman. Such evidence weighed against Goldstein and his conviction ought not to stand if the communications implicating the others were improperly received." 103 F. 2d 352. See also United States *v.* Thomson, 113 F. 2d 643.

[7] 120 F. 2d 489.

[8] Weeks *v.* United States, 232 U. S. 383.

[9] Silverthorne Lumber Co. *v.* United States, 251 U. S. 385.

[10] Olmstead *v.* United States, 277 U. S. 438; Goodman *v.* United States, 962, Oct. Term 1940.

spect of the prohibitions of the Federal Communications Act at the instance of the sender of the message against whom evidence derived from its unlawful interception is sought to be introduced. *Nardone* v. *United States,* 308 U. S. 338.

The question now to be decided is whether we shall extend the sanction for violation of the Communications Act so as to make available to one not a party to the intercepted communication the objection that its use outside the courtroom, and prior to the trial, induced evidence which, except for that use, would be admissible.

No court has ever gone so far in applying the implied sanction for violation of the Fourth Amendment. While this court has never been called upon to decide the point,[11] the federal courts in numerous cases, and with unanimity, have denied standing to one not the victim of an unconstitutional search and seizure to object to the introduction in evidence of that which was seized.[12] *A fortiori* the same rule should apply to the introduction of evidence induced by the use or disclosure thereof to a witness other than the victim of the seizure. We think no broader sanction should be imposed upon the Government in respect of violations of the Communications Act. The court below was of the view that a divulgence of the intercepted messages might lawfully be made with the consent of the sender, and we agree. The court further thought that, as the sender might make such divulgence lawful by his consent, none but he was intended to be protected against divulgence by the statute.[13] Again we agree.

The petitioners, however, point out that the statute also forbids the use of an unlawfully intercepted message, or any information therein contained, by any person for his own benefit or the benefit of another not entitled thereto; and they say that the Government officials violated the Act by using the messages and the information they contained, to induce the senders' confessions

[11] The privilege against self-incrimination afforded by the Fifth Amendment is personal to the witness. Hale v. Henkel, 201 U. S. 43; Wilson v. United States, 221 U. S. 361.

[12] The principle has been applied in at least fifty cases by the Circuit Courts of Appeals in nine circuits and in the Court of Appeals for the District of Columbia, not to mention many decisions by District Courts. Many of the cases are collected in Note 168 to the text of the Fourth Amendment in the United States Code Annotated.

[13] It has been held that both parties to a telephone conversation are senders, as the statute uses the term. United States v. Polakoff, 112 F. 2d 888.

and testimony. They urge that such use is forbidden by the Act and that they have standing to object to the introduction of the evidence thus obtained. The Government answers that this provision of the Act was not intended to reach the use of the contents of the messages by federal officers for obtaining evidence but was meant to prevent use for the personal advantage or benefit of the user. We have no occasion to determine the soundness of the Government's argument.

We are of opinion that even though the use made of the communications by the prosecuting officers to induce the parties to them to testify were held a violation of the statute, this would not render the testimony so procured inadmissible against a person not a party to the message. This is the settled common law rule.[14] There was no use at the trial of the intercepted communications, or of any information they contained as such. If such use as occurred here is a violation of the Act, the statute itself imposes a sanction.[15]

The judgments are

Affirmed.

Mr. Justice JACKSON took no part in the consideration or decision of this case.

A true copy.

Test:

Clerk, Supreme Court, U. S.

[14] Olmstead v. United States, 277 U. S. 438, 466, 467.
[15] Section 501, 47 U. S. C. § 501.

SUPREME COURT OF THE UNITED STATES.

No. 256.—October Term, 1941.

Dr. Maximilian Goldstein, Dr. Benjamin Schwartz, Herman Rubin, and Irving Elentuch, Petitioners,
vs.
The United States of America.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

[April 27, 1942.]

Mr. Justice Murphy, dissenting.

The Chief Justice, Mr. Justice Frankfurter, and I cannot agree with the opinion of the Court.

Messman and Garrow were the chief witnesses for the Government, and the testimony of each was vital. It is not disputed that Messman turned state's evidence after he was confronted with the contents of telephone messages which implicated him in the offense but which had been obtained by wire-tapping in violation of § 605 of the Federal Communications Act. The extent of the unlawful "tapping" and the keen desire of the Government officials to use the "taps" to secure other testimony are graphically illustrated by the following statement made by an assistant United States attorney to Messman after his arrest:

"I am telling you before we go any further that there is no use of us kidding each other. We have watched your telephone; we have watched all these lawyers' telephones; we have had rooms tapped. We know what is going on. We are not stabbing in the dark. If you want to hear your voice on a record we will be glad to play it. In your instance, Doctor, there is so much to cover. You have been in this for so many years that we feel that in order for you to help yourself, since you are considered one of the principals here, it would be wise for you to indicate to us whether you intend to tell us everything and come clean, or whether you intend to play ball with the Garrows and the rest of the crowd. We feel that you can be of great value and you want to help yourself. That is straight talk."

And Garrow knew of the existence of records of damaging conversations made by illegal "taps" on his lines before his decision to testify for the Government.

Neither the intercepted messages nor their purport were placed in evidence, and, so far as the record shows, petitioners were not parties to them. It is evident, nevertheless, that the evidence adduced by the Government against petitioners through the testimony of Messman and Garrow was obtained by the use of information gathered by wire-tapping in violation of law.[1]

The main question presented for decision is whether evidence so obtained is vitiated and rendered inadmissible by § 605, the relevant part of which reads:

"... and no person not being authorized by the sender shall intercept any communication and divulge or publish the existence, contents, substance, purport, effect, or meaning of such intercepted communication to any person; ... and no person having received such intercepted communication or having become acquainted with the contents, substance, purport, effect, or meaning of the same or any part thereof, knowing that such information was so obtained, shall divulge or publish the existence, contents, substance, purport, effect or meaning of the same or any part thereof, *or use the same or any information therein contained for his own benefit or for the benefit of another not entitled thereto* ..."[2]

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[1] Both Messman and Garrow testified at the preliminary hearing that the "taps" did not influence their decisions to testify for the Government, but each was an accomplished perjurer. We do not understand that the trial judge, in ruling that the testimony of Messman and Garrow was admissible, meant to find that the Government proved that the "taps" did not contribute to their breakdown. On the contrary, it is clear that he meant to find only that petitioners failed to carry the burden of proving that the Government secured the testimony of Messman and Garrow by use of the "taps", a burden which he erroneously put upon petitioners. For after an accused sustains the initial burden, imposed by Nardone v. United States, 308 U. S. 338, of proving to the satisfaction of the trial judge in the preliminary hearing that wire-tapping was unlawfully employed, as petitioners did here, it is only fair that the burden should then shift to the Government to convince the trial judge that its proof had an independent origin. As the court below said:

"... this should be the rule in analogy to the well settled doctrine in civil cases that a wrongdoer who has mingled the consequences of lawful and unlawful conduct, has the burden of disentangling them and must bear the prejudice of his failure to do so; that is, that it is unfair to throw upon the innocent party the duty of unravelling the skein which the guilty party has snarled. To impose the duty upon the prosecution is particularly appropriate here, for it necessarily has full knowledge of just how its case has been prepared; given a prima facie case against it, i. e., 'taps' and some use of them, it should do the rest." 120 F. 2d 485, 488.

Since the trial judge did not shift the burden to the Government after petitioners' initial showing as he should have done, there can be no contention on this record that the testimony of Messman and Garrow was untainted by "taps".

[2] Emphasis added.

The statute expresses a rule of public policy. In enacting § 605 Congress sought to protect society at large against the evils of wire-tapping and kindred unauthorized intrusions into private intercourse conducted by means of the modern media of communication, telephone, telegraph, and radio. To that end the statute prohibits not only the interception and the divulgence of private messages without the consent of the sender, but also the use of information so acquired by any person not entitled to it. The protection of the statute would have been illusory indeed if, while interception and divulgence were penalized, one was free, nevertheless, to use information so obtained. Unless the language of the "'use for benefit" prohibition does not mean what it says, the actions of the Government agents in securing the benefit of the crucial testimony of Messman and Garrow by the use of illegal "taps" were clear violations of that prohibition. There is no merit in the Government's contention that the unequivocal language of the "use for benefit" clause should be construed as condemning only such uses as are designed to result in some monetary or other similar benefit of a private nature, for the prohibitions of § 605 are applicable to the Government and its officers, as well as to private persons. *Nardone* v. *United States,* 302 U. S. 379. The prohibition in this last clause of § 605 by Congress of the "use" of outlawed evidence is so unequivocal and controlling that the failure of the court below even to refer to this clause can only be explained on the assumption that it was overlooked.

On the issue of admissibility the second *Nardone* case, 308 U. S. 338, the logical extension of the principles of *Nardone* v. *United States,* 302 U. S. 379, and *Weiss* v. *United States,* 308 U. S. 321, should control our decision. In that case, as in this, the evidence in dispute was not the messages themselves or their purport, but the claim was made that other evidence against the defendants was obtained by the use of information gained by unlawful wire-tapping. We held that the policy of § 605 required the exclusion not merely of the intercepted messages but also of the other evidence acquired through their unlawful use. Otherwise the broad purpose of the statute to outlaw practices "inconsistent with ethical standards and destructive of personal liberty"[3] would have been largely defeated. We also suggested the preliminary hearing as a procedure for determining what evidence was the

[3] Nardone v. United States, 302 U. S. 379, 383.

"fruit of the poisonous tree" and hence inadmissible. Since the preliminary hearing in this case leaves no doubt that the testimony of Messman and Garrow was the forbidden fruit, it should not have been admitted.

The only possible differentiation between this case and the second *Nardone* case is that here petitioners were not parties to the illegally intercepted messages, but that calls for no difference in legal result. While the sender can render interception, divulgence, or use lawful by his consent, it is a complete non-sequitur to conclude that he alone has standing to object to the admission of evidence obtained in violation of § 605. To say that petitioners have no standing to object to the testimony of Messman and Garrow because they were not parties to the intercepted messages used to secure that testimony, is to ignore the governing factor that controlled our decision in the second *Nardone* case, namely, that to permit the use of evidence so obtained would defeat or substantially impair the underlying policy and purpose of § 605. It is immaterial, for the object to be served by that section, whether objection is made by the one sending the communication or by another who is prejudiced by its use. The rule that evidence obtained by a violation of § 605 is inadmissible is not a remedy for the sender; it is the obedient answer to the Congressional command that society shall not be plagued with such practices as wire-tapping.

Lower federal court cases to the effect that only the victim of a search and seizure contravening the Fourth Amendment can object to the evidence thereby obtained do not offer a proper analogy. Not only are those decisions hard to square with statements by Mr. Justice Holmes in *Silverthorne Lumber Co.* v. *United States*, 251 U. S. 385, 392,[4] but, even assuming their soundness, sufficient difference in scope exists between § 605 and the Fourth Amendment to render analogy unsafe. Thus § 605 for-

[4] "The essence of a provision forbidding the acquisition of evidence in a certain way is that not merely evidence so acquired shall not be used before the court, but that it shall not be used at all. . . . the knowledge gained by the government's own wrong cannot be used by it in the way proposed."

The guaranties of the Fourth Amendment "are to be liberally construed to prevent impairment of the protection extended". Grau v. United States, 287 U. S. 124, 128, and cases cited.

It is evident that to allow the Government to use evidence obtained in violation of the Fourth Amendment against parties not victims of the unconstitutional search and seizure is to allow the Government to profit by its wrong and to reduce in large measure the protection of the Amendment.

bids all interception, divulgence, or use by any person without the consent of the sender, while the Fourth Amendment bans only unreasonable searches and seizures.

The holding in the opinion of the Court that evidence obtained in violation of § 605 is not rendered inadmissible because § 501 of the Act provides specific sanctions for violations of § 605, is a direct repudiation of both *Nardone* cases and the *Weiss* case. In each of those cases evidence secured by violation of § 605 was declared to be inadmissible, despite the existence of § 501. This is so because, as we held in the first *Nardone* case, "the act forbids such testimony." 302 U. S. 379, 382. That evidence procured in violation of federal law by agents of the Government is inadmissible in federal prosecutions has been established and enforced by an unbroken series of decisions in this Court beginning with *Weeks* v. *United States*, 232 U. S. 383. By these decisions this Court has refused to make itself a participant in lawless conduct by sanctioning the use in open court of evidence illegally secured. That principle was forcibly put in a separate opinion in *Sorrells* v. *United States*, 287 U. S. 435, 453. After referring to "the inherent right of the court not to be made the instrument of wrong", the opinion continues: "The doctrine [the defense of entrapment] rests, rather, on a fundamental rule of public policy. The protection of its own functions and the preservation of the purity of its own temple belongs only to the court. It is the province of the court and the court alone to protect itself and the government from such prostitution of the criminal law." 287 U. S. 435, 456, 457. When Congress condemned the "use" of lawlessly intercepted communications, the last thing it intended to sanction was the use of such interceptions in a court of justice. There can be no reason to ignore or silently overrule our considered decisions in both *Nardone* cases and the *Weiss* case, especially in view of the fact that Congress has had several opportunities since the first *Nardone* case to amend § 605 to obviate the result of that case if it were not a true interpretation of Congressional policy and intent.[5]

[5] Several attempts to amend § 605 since the first Nardone case have failed of enactment. See S. 3756, 75th Cong., 3d Sess. (1938) and S. Rep. No. 1790, 75th Cong., 3d Sess. (1938) p. 3. See also H. J. Res. 571, 76th Cong., 3d Sess. (1940); H. R. 2266, 77th Cong., 1st Sess. (1941); H. R. 3099, 77th Cong., 1st Sess. (1941); H. R. 4228, 77th Cong., 1st Sess. (1941).